Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOIS STRAWSER, *et al.*
Petitioners,

v.

NANCY V. ATKINS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a court purporting to apply the "plain meaning" rule of statutory construction properly give effect to the will of Congress when its construction:

(a) assumes clear and unambiguous language where other courts have discerned ambiguity;

(b) partially repeals a statute by implication where neither the purportedly repealing enactment nor its legislative history refers to the statute allegedly repealed;

(c) rejects a plain interpretation that gives effect to both the earlier and later statutes, and ignores the cardinal obligation to harmonize statutes whenever possible;

(d) ignores the statutory context that confirms a more plausible legislative intent;

(e) renders all but the last sentence of the latter enactment superfluous;

(f) finds an implied repeal in an emergency appropriations rider—despite rules in both houses of Congress that forbid such substantive change of law in appropriations measures; and

(g) effects a massive taking of property without just compensation, a result not contemplated by Congress, raising serious constitutional problems that can easily be avoided with a harmonizing interpretation?

PARTIES TO PROCEEDING

The parties to the proceedings below were:

West Virginia

Petitioners:

Lois Strawser; Joyce Perry; James H. Sheppard; Mary Jean Booth; Joyce D. Barker; Betty Jean Gilman; and Kathy Robertson, individually and on behalf of all others similarly situated.

Respondents:

Nancy V. Atkins, in her capacity as Commissioner of the Bureau of Medical Services, West Virginia Department of Health and Human Resources, Defendant; Darrell W. Peters, in his capacity as Supervisor, Third Party Liability, Office of Administration, Accounts Receivable Unit of the bureau for Medical Services, West Virginia Department of Health and Human Resources; Paul L. Nusbaum, in his capacity as Secretary of the West Virginia Department of Health and Human Resources; Darrell V. McGraw, Jr., in his capacity as Attorney General of the State of West Virginia; and Citibank, N.A., Escrow Agent. [1]

South Carolina

Petitioners:

Stephen Albert Joseph, Jr.; Selma Charlene Hatfield; Howard S. Miller; Annie Sam Mosteller; Deborah Kay Mullins; Mamie Brewer, Personal Representative of the Estate of Calvin Brewer; Brenda Carson, Personal Representative of the

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[1] Respondent Citibank was substituted for John Doe who was originally named in the West Virginia Complaint.

Estate of Bondale Carson Miller; Margaret Renee Fleming, Personal Representative of the Estate of Ernestine Fleming; Laura Kelly, Personal Representative of the Estate of Elizabeth Mcabee; Alford Welborn, Individually and on behalf of others similarly situated.

Respondents:

Charles M. Condon, in his Official Capacity as South Carolina Attorney General; Citibank, N.A.; William A. Prince, in his official capacity as Director of South Carolina Department of Health and Human Services; and Chase Manhattan Bank (USA), N.A., in its official capacity as Escrow Agent.[2]

North Carolina

Petitioners:

The Estate of Hilda White, by and through Administratrix Jane Doe;[3] The Estate of Robert Cornelison, by and through Personal Representative, Helen Forte; Maude C. Strickland; the Estate of Robert W. Eltz, by and through personal representative, Nellie Eltz; The Estate of Marvin King, by and through Personal Representative, Donna King; The Estate of Maggie Irving, by and through Personal Representative, Wanda Jones; The Estate of Annis E. Messer, by and through Personal Representative; Charles Messer; Deborah Morey; The Estate of Hester Heatherly, by and through Personal Representative, Carroll Heatherly; on behalf of themselves and all others similarly situated.

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2 Respondent Prince was substituted for Sam Griswold who was originally named in the South Carolina Complaint.

3 Ms. White's Estate was recently substituted due to her death.

Respondents:

Michael F. Easley, in his official capacity as Governor of North Carolina; John Doe, in his or its official capacity as Tobacco Escrow Agent for the State of North Carolina; Richard H. Moore, in his official capacity as Treasurer of North Carolina; Carmen Hooker Buell, in her official capacity as Secretary of the N.C. Department of Health & Human Services; Nina M. Yeager, in her official capacity as Director of the Division of Medical Assistance; and The Golden L.E.A.F. (Long-term Economic Advancement Foundation), Inc., a N.C. Nonprofit Corporation.[4]

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[4] Respondents Easley, Moore, Buell, and Yeager were substituted for James B. Hunt, Jr., Harlan Boyles, H. David Bruton, and Paul R. Perruzzi who were originally named in the North Carolina Complaint.

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OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit decided the appeals of three cases from West Virginia, South Carolina and North Carolina in a single opinion of which this Petition seeks review. The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 290 F.3d 720 (4th Cir. 2002), is set forth in the Appendix at App. 3a. The opinion of the United States District Court for the Southern District of West Virginia, reported at 126 F. Supp. 2d. 994, is set forth in the Appendix at App. 57a. The opinion of the United States District Court for the District of South Carolina is set forth in the Appendix at App. 41a. The opinion of the United States District Court for the Western District of North Carolina, reported at 2000 U.S. Dist. LEXIS 19731, and the Magistrate Judge's Memorandum Recommendation and Order are set forth in the Appendix at App. 24a and 30a respectively.

BASIS FOR JURISDICTION

The opinion of the Fourth Circuit United States Court of Appeals was issued on May 22, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the United States Constitution Amendments V and XIV appear in the Appendix at App. 133a. In addition, the relevant portions of the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57 (1999) (codified at 42 U.S.C. § 1396b(d)(3)) and of 42 U.S.C. § 1396k appear at App. 137a and 135a, respectively.

STATEMENT OF RELATED CASES

Currently pending before the Court are Petitions for Writs of Certiorari to the First and Tenth Circuits. *See Greenless v. Almond*, 277 F.3d 601 (1st Cir.), *petition for cert. filed*, (U.S.

April 29, 2002) (No. 01-1635); and *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), *petition for cert. filed*, (U.S. April 5, 2002) (No. 01-1463). Both Petitions present essentially the same issue of statutory construction.

STATEMENT OF THE CASE

This case derives from the lawsuits by the fifty States against tobacco companies to recoup the States' Medicaid expenditures. These historic lawsuits ultimately led to an unprecedented settlement in which States stand to collect billions of dollars in perpetuity.

Federal Medicaid law provides that upon actual collection of any Medicaid recovery—for example, upon each future annual payment from tobacco companies—the state and federal governments are fully made whole for their Medicaid expenditures. The balance of the recovery, if any, goes to individual Medicaid recipients such as Petitioners here. 42 U.S.C. § 1396k(b).

Notwithstanding the simplicity of this proposition, in the several States where Medicaid recipients have sued to enforce supreme federal Medicaid law, including West Virginia, South Carolina and North Carolina, nearly all courts have decided that Medicaid recipients lose, but their multiple paths to that result often contradict each other and this Court's authoritative direction. While district courts have nearly all dismissed these Medicaid enforcement cases on Eleventh Amendment sovereign immunity grounds, only one of the eight federal courts of appeal to decide a Medicaid case has agreed. Furthermore, two circuits expressly disagreed, holding correctly that the Eleventh Amendment did not bar this suit for prospective enforcement of supreme federal law. The other five circuits elected to bypass the Eleventh Amendment question and affirmed on different grounds.

Four federal courts of appeal—the First, Second, Fourth, and Tenth Circuits—decided the case based upon an emergency

appropriations rider enacted in 1999, in which Congress waived the federal share of the States' historic Medicaid recovery. *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04 (1999), codified at 42 U.S.C. § 1396b(d)(3) (App. at 137a). These courts inflated that express waiver of the *federal* share into an implied repeal of *Medicaid recipients'* statutory entitlement to the remainder under 42 U.S.C. § 1396k(b).

This Petition seeks review of this remarkable departure from established canons of statutory construction.

A. The Medicaid Program

"The Medicaid program provides federal funds to States that pay for medical treatment for the poor." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981). It is "a cooperative federal-state program through which the Federal Government provides financial assistance to the states so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 502 (1990).

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae,* 448 U.S. 297, 301 (1980); *see also Wilder*, 496 U.S. at 501. West Virginia, South Carolina and North Carolina have chosen to participate in the Medicaid program. These States have codified their programs of medical assistance to low-income persons, wherein the States commit to administer their Medicaid programs within the requirements of the Medicaid Act. *See* W. Va. Code §9-1-1 *et seq.*, S.C. Code; Title 43, Chapter 7 and N.C. Gen. Stat. § 108A-54 *et seq.*

Among the provisions of the Medicaid Act, to which West Virginia, South Carolina and North Carolina expressly subscribed in exchange for millions of dollars of federal assistance, is mandatory recovery, where practicable, of Medicaid expenditures for which third parties are

responsible. 42 U.S.C. § 1396a(a)(25). Such a recovery must then be distributed in the following order: (1) to the state, for its Medicaid expenditures; (2) to the federal government, for its contributed expenditures; and (3) to the injured Medicaid recipients on whose behalf the expenditures were made. *See* 42 U.S.C. § 1396k(b) (App. at 136a); *see also* 42 C.F.R. § 433.154 (same); 45 Fed. Reg. 8983 (1980) (HCFA's official commentary). This distribution requirement ensures that both the state and federal government are made whole, with the balance of a recovery, if any, going to the injured party.

B. Medicaid Recovery: The Tobacco Settlement

This case arises following the resolution of three separate lawsuits brought by West Virginia, South Carolina, and North Carolina against manufacturers of tobacco products. Prominent in these lawsuits, as with tobacco lawsuits in other States, were claims of Medicaid expenditures caused by tobacco products.

West Virginia filed suit against manufacturers of tobacco products on September 20, 1994, followed by South Carolina on May 12, 1997 and North Carolina on December 21, 1998. As a result of these lawsuits, these three States became eligible to participate in a Master Settlement Agreement ("MSA") crafted by the tobacco industry and the Attorneys General of 46 settling States. In the MSA, the States agreed to "unconditionally release and forever discharge" the tobacco defendants from "any future claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products." MSA at 8, 55. In exchange for this release, the States, including West Virginia, South Carolina, and North Carolina, became eligible to collect from the tobacco defendants future anticipated annual payments in a total amount then estimated at $206 billion. The complaints in these cases plead, and the evidence submitted to the district courts confirms, that the settlement collections of West Virginia, South Carolina, and

North Carolina will substantially exceed their actual smoking-related Medicaid expenditures.

Significantly, before these Medicaid enforcement lawsuits, there was no material controversy over the straightforward proposition that the tobacco settlement constituted a Medicaid recovery; States themselves behaved in conformity to § 1396k(b)'s mandatory distribution scheme. In testimony before Congress, the Deputy Administrator of the Health Care Financing Administration ("HCFA," then the name of the agency responsible for administering the Medicaid program), stated:

> Existing Federal law clearly requires States to share all Medicaid recoveries with Federal taxpayers. **Nothing in the law creates an exception for tobacco settlements, regardless of their size.** States routinely report and credit HCFA with the Federal share of third party liability collections. It is worth highlighting that three States—Massachusetts, Louisiana, and Florida—reported and credited to HCFA some of their tobacco collections as part of a settlement with the Liggett Corporation. Although the funds involved in the Liggett settlement are much smaller than those at stake in the comprehensive settlement, these initial payments indicate that **the States understand their legal and fiduciary responsibility to credit the Federal government with its share of tobacco settlement proceeds.**

Medicaid and Tobacco Settlements, 1999: Before Subcommittee on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations, March 15, 1999, (Statement of Mike Hash, Deputy Administrator, Health Care Financing Administration) (emphasis added).

C. This Lawsuit for Prospective Enforcement of 42 U.S.C. § 1396k(b).

In West Virginia, Petitioners Lois Strawser *et al* filed suit on behalf of themselves and all others similarly situated in the United States District Court for the Southern District of West Virginia on January 26, 2000. An Amended Complaint was filed on April 26, 2000. Defendants Lawton, Peters, and Ohl filed a motion to dismiss on May 19, 2000 claiming that Eleventh Amendment sovereign immunity barred Petitioners' claims and that the West Virginia Plaintiffs failed to state a claim upon which relief may be granted. On May 26, 2000, Defendant McGraw filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and also arguing that the Eleventh Amendment barred the action. On July 10, 2000, Defendant Citibank, N.A. filed its motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). The District Court granted the Defendants' motions to dismiss and dismissed all counts of the Amended Complaint by Order and Judgment dated January 3, 2001.

In South Carolina, Petitioners Stephen Albert Joseph, Jr., et al filed suit on behalf of themselves and all others similarly situated in the United States District Court for the District of South Carolina on January 26, 2000. Defendants Condon and Griswold filed a motion to dismiss on April 25, 2000. arguing that the Eleventh Amendment barred the action and that the South Carolina Plaintiffs failed to state a claim upon which relief could be granted. On June 8, 200, Defendant Citibank, N.A., filed its motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The trial court granted Defendants' motions and dismissed all

claims by the South Carolina Plaintiffs by order dated March 19, 2001.

In North Carolina, Petitioners Hilda White, *et al* filed suit on behalf of themselves and all others similarly situated in the United States District Court for the Western District of North Carolina on January 27, 2000. Defendants Hunt, Boyles, Bruton and Peruzzi filed a motion to dismiss on March 13, 2000, claiming that Eleventh Amendment sovereign immunity barred Petitioners' claims and that the North Carolina Plaintiffs failed to state a claim upon which relief may be granted. On the same day, Defendant The Golden L.E.A.F., Inc. served a similar motion and brief. On June 6, 2000, Defendant Citibank, N.A. also filed a Motion to Dismiss. The trial court granted the motions of the officials and Citibank and dismissed all claims by the North Carolina Plaintiffs by order dated September 25, 2001.

Following timely appeals and briefing, oral argument on the three cases was heard *in seriatim* by the Fourth Circuit on April 3, 2002. The Fourth Circuit affirmed the decisions of the three District Courts in a single opinion in which the court elected to bypass the Eleventh Amendment question and instead decided that Congress' 1999 emergency appropriations rider (App. at 16a-23a)—an amendment to a separate section of the Medicaid Act concerning only calculation of money due the federal government—implicitly repealed § 1396k(b) and thus *sub silentio* stripped Medicaid recipients of substantial vested rights. Neither the text of the 1999 appropriations rider nor its legislative history makes any reference to § 1396k(b) or to the rights of Medicaid recipients embodied therein.

REASONS FOR GRANTING THE WRIT

This case frames a pure issue of statutory construction with implications for how every judge in every district and appellate court interprets legislation. Petitioners respectfully contends that the opinions by the First, Second, Fourth, and Tenth Circuits contain erroneous views and application of

the weight and interrelation of core canons of statutory construction.

The Fourth Circuit concluded that the final sentence of Congress' 1999 appropriations rider—permitting the States to "use the sums described in clause (i) for any expenditures determined appropriate by the State"—means that the States could spend the *entire* tobacco settlement in any manner they pleased, and that Congress thus not only gifted billions of *federal* dollars to the states but likewise by stealth stripped Medicaid recipients of their vested statutory rights.

Yet the text of the appropriations rider does not say that. Nor could its *context* cue any conclusion other than the opposite one. And the rider's legislative history confirms the error. The members of Congress debated only what to do with the *federal* share of the States' Medicaid recovery. The members of Congress then located their enactment in a section of the Medicaid Act addressing only money to which the *federal government* would have been entitled. And they did so with an emergency appropriations rider—the kind of enactment *least* suited to affect substantive change in law (which is why rules in both houses of Congress forbid it). Never once did any member of Congress ever mention or even imply any intention to affect Medicaid recipients' rights.

At stake here is not only a massive confiscation of property from the nation's poorest citizens,[6] or merely a mistaken interpretation of a single statute—but the basis upon which the judiciary lays claim to principled and consistent decision-making. The danger in the circuit decisions is an unprecedented departure from the rules that discipline judges

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[6] Medicaid, as "the payor of last resort," requires citizens to spend down their assets to meet eligibility levels. *See* 42 U.S.C. 1396a(a); S.Rep. No. 99-146 at 312, reprinted in 1986 U.S. Code Cong. & Ad. News, vol. 3A, 279 ("Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays.").

in "giving effect to the will of the Legislature." *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738, 866 (1824). The published opinions to date—and more Medicaid enforcement cases are currently under consideration[7]—imperil the utility and integrity of the canons of construction. On this record, the core canons of statutory construction have little power to cabin judicial discretion.

The following eight well-settled canons of statutory construction set forth in the following Supreme Court cases are impacted by the Fourth Circuit's decision.

- **"[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."** *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotations omitted). The two statutory provisions at issue are clearly capable of co-existence—in § 1396k(b), Congress mandated a specific distribution scheme for Medicaid recoveries; in the 1999 appropriations rider, Congress declared that the states were free to use *the federal share* of the tobacco settlement however they wish.

- **"[T]he meaning of statutory language, plain or not, depends on context."** *Bailey v. United States*, 516 U.S. 137, 145 (1995). The statutory context of the 1999 amendment confirms Congress' intent only to waive the federal share of the tobacco settlement, not to affect Medicaid recipients' rights.

- **"[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."** *United States v. Fausto*, 484 U.S. 439, 453 (1988). Neither the text nor legislative history

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[7] The following cases are currently pending in the Third, and Ninth Circuits: *Broselow v. Fisher*, No. 01-3933 (3rd Cir.); *Anderson v. Crawford*, No. 01-15986 (9th Cir.); and *Cardenas v. Anzai*, No. 01-15297 (9th Cir.).

of the 1999 appropriations rider even hints at any intention to affect § 1396k(b) or the rights of Medicaid recipients.

- **"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest."** *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (implied repeals would require "positive repugnancy between the provisions"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Congress did not even hint at intent to repeal § 1396k(b), much less make it clear and manifest or enact a "positive repugnancy."

- **"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"** *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders superfluous all of the 1999 amendment except the final sentence.

- **The doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act."** *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The 1999 amendment was an emergency appropriations rider—a legislative vehicle that, by rules in both houses of Congress, cannot affect substantive change in law.

- **"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to**

ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The circuit court's interpretation operates retroactively to strip Medicaid recipients of substantial vested rights, though Congress never hinted at any intention to affect Medicaid recipients *at all*, much less directed such a confiscation with "the requisite clarity."

- **Statutes must be interpreted to avoid not merely unconstitutional results, but "difficult constitutional questions," and where, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems."** *St. Cyr*, 533 U.S. at 300 & n.13. According to the circuit court's interpretation, Congress retroactively confiscated Medicaid recipients' statutorily vested property interest in the tobacco settlement remainder—which assuredly raises a "difficult constitutional question," despite a logical and persuasive interpretation that avoids constitutional difficulty.

The "plain meaning" doctrine is a powerful force that disciplines judiciary and legislature alike—but like all rules of statutory construction, its power must be exercised responsibly and always in the service of discerning actual legislative intent. This Court's recent unanimous disposition in *Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230 (2002)—reversing the en banc Ninth Circuit—is illustrative. The en banc Ninth Circuit contrived an inventory of improper canons to subvert plain statutory meaning and clear congressional intent. Here, the Fourth Circuit found the statutory amendment to be clear, though it is not, and could thus disregard numerous well-settled canons of construction that confirmed a different meaning. True legislative intent—the point—is subverted in both

approaches. This case is a vehicle for the Court to convey that message forcefully.

This case provides an ideal complement to the principles forcefully enunciated in *Rucker*. Where *Rucker* illustrates the proper use of the plain meaning doctrine, this case illustrates its misuse.

If, as Petitioners respectfully contend, the First, Second, Fourth, and Tenth Circuits erred, then the very magnitude of that error, in a case affecting millions of Americans immediately, and countless more in future judicial dispositions, warrants this Court's intervention to correct it. If, as Respondents will contend, the circuit decisions are correct in result, then this Court's explanation of a principled basis for that result can have enormous consequences for how judges and litigants comprehend and apply the tools of statutory construction.

ARGUMENT

I. The Current Medicaid Enforcement Landscape

Numerous district courts and eight federal courts of appeal, including the Fourth Circuit, have decided similar cases on a variety of often contradictory grounds. Decisions to date are nearly all adverse to Medicaid recipients—yet that "momentum" is so fragmented and so fraught with conflict and disagreement that the ease with which most courts have apparently decided the result very much belies the struggle to find a principled basis for that result.

The first—and perhaps most influential—Medicaid enforcement disposition in federal court was *Floyd v. Thompson*, 111 F.Supp.2d 1097 (W.D. Wis. 1999), *aff'd on other grounds*, 227 F.3d 1027 (7th Cir. 2000). The court dismissed the case by declaring that the tobacco settlement proceeds were "fixed" and had already "vested" in the state, rendering the case one for retrospective "damages" and thus barred by the Eleventh Amendment—a conclusion both

factually wrong and legally irrelevant to the proper *Ex parte Young* analysis.

But the Wisconsin court's analytical error spread rapidly through other district courts, and at least eleven such courts reproduced the Wisconsin court's fallacious reasoning in dismissing these cases on Eleventh Amendment grounds.[8]

The first federal appellate court to decide a Medicaid case was the Seventh Circuit in *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000). Concluding that the Eleventh Amendment questions were "complex" and "not easily answered," *id.* at 1034-35, the Seventh Circuit skipped them and proceeded to the merits. As to Congress' 1999 appropriations rider—now the most common basis for adverse decisions in appellate courts and the basis for this Petition—the Seventh Circuit simply discerned ambiguity: maybe Congress agreed with the States or maybe Congress was just "feeling generous." *Id.* at 1034.

Thus, the Seventh Circuit acknowledged ambiguity in precisely the words that the Fourth Circuit found to be clear. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).

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[8] *See Barton v. Summers*, 111 F.Supp.2d 989, 992 (M.D.Tenn. 2000) *aff'd*, 293 F.3d 944 (6th Cir. 2002); *White v. Hunt*, 2000 WL 33261006, *5, No. 00-CV-14 (W.D.N.C. Jul. 12, 2000); *McClendon v. Georgia Dep't of Community Health*, No. 4:00-CV-0026-HLM, slip op. at 17 (N.D.Ga. Aug. 28, 2000); *Downs v. Kentucky*, No. 00-23, slip op. at 7 (E.D.Ky. Aug. 31, 2000); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D.N.M. 2000); *Strawser v. Lawton*, 126 F.Supp.2d 994, 1003 n.6 (S.D.W.Va. 2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704, 709 (D.Haw. 2001); *Greenless v. Almond*, No. 00-037ML, slip op. at 6 (D.R.I. Feb. 26, 2001); *Rickerts v. Guinn*, No. CV-N-00-0176-HDM, slip op. at 4 (D.Nev. Feb. 27, 2001); *Clark v. Stovall*, 158 F.Supp.2d 1215, 1224 (D.Kan. 2001) aff'd on other grounds, 2002 U.S. App. Lexis 832 (10th Cir. Kan. April 29 2002); *Joseph v. Condon*, No. 6:00-324-24, slip op. at 11 (D.S.C. Mar. 19, 2001).

On narrow grounds of Wisconsin assignment law, the Seventh Circuit held that § 1396k(b) did not come into play because there was not (and, logically extending this holding, never could or ever will be under any circumstances) a "remainder" to which Medicaid recipients could be entitled. If, as the Seventh Circuit found, the "assignment [to the state by Medicaid recipients] corresponds exactly to the amounts the state pays," *Floyd*, 227 F.3d at 1037, then 42 U.S.C. § 1396k(b) is a nullity, never triggered, and so much statutory surplusage—because any conceivable remainder has been defined out of existence by the artifice of declaring that the state collects "under an assignment" exactly what it spends.

The Fifth Circuit then decided *Watson v. State of Texas*, 261 F.3d 436 (5th Cir. 2001), a Medicaid enforcement action with a somewhat different procedural posture. Confronting the Eleventh Amendment head on—but not addressing *Ex parte Young*—the Fifth Circuit concluded simply that the State of Texas had waived its sovereign immunity in the Master Settlement Agreement as to matters of enforcing that Agreement, and that the instant case was such a case of enforcement.

As to Congress' 1999 appropriations rider, the Fifth Circuit held exactly as the entire text, its context and legislative history compel: "The Federal Government has waived any claim it may have to reimbursements." *Id.* at 443 (citing 42 U.S.C. § 1396b(d)(3)(B)(i)). Nothing more, nothing less. The Fifth Circuit then proceeded to its version of the merits, and concluded that Texas proceeded "directly" against tobacco companies, rather than through subrogation or assignment, and that the absence of state claims "under an assignment" accordingly failed to trigger § 1396k(b). *Id.* at 444. Thus, while the Seventh Circuit's disposition essentially reads § 1396k(b) out of the statute books, the Fifth Circuit's disposition permits a state to accomplish that remarkable result at its pleading discretion (*viz.*, by

proceeding "directly" against a third-party tortfeasor, rather than "under an assignment").

Ten days after the Fifth Circuit's disposition, the Eleventh Circuit decided *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252 (11th Cir. 2001). Doubling back to the Seventh Circuit's approach, and likewise finding the *Ex parte Young* issues "much thornier," *id.* at 1259, the Eleventh Circuit skipped to the merits, and concluded that Georgia only collected under the statutory assignment "what it actually spent on medical assistance." *Id.* at 1261. Again, the deceptively elegant appearance of this disposition (assignment equals collection) belies what is in fact a complete evisceration of § 1396k(b)—or that portion of it that benefits Medicaid recipients. In the Seventh and Eleventh Circuits, the phrase, "and the remainder of such amount collected shall be paid to such individual," has disappeared from the United States Code, there no longer being any possibility of such a "remainder."

The Tenth Circuit weighed in next with yet a fourth approach to the issues. In *Harris v. Owens*, 264 F.3d 1282 (10th Cir.), *petition for cert. filed* (April 5, 2002) (No. 01-1463), the court first concluded that it was obliged to resolve the Eleventh Amendment issue. "Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Id.* at 1288.

Thereupon, the Tenth Circuit finally addressed and authoritatively dispatched the mischief wrought by the Wisconsin district court in *Floyd*. "From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount can be reduced to present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant." *Id.* at 1291-92. Concluding that the state's decision to keep the entire tobacco windfall "may constitute

an ongoing violation of federal law," and that the plaintiff sought only "prospective" relief with respect to future collections, the Tenth Circuit concluded that *Ex parte Young* operated to avoid the Eleventh Amendment bar. The court only then turned to the merits. For multiple reasons discussed hereunder, the Tenth Circuit erred in concluding that Congress' 1999 appropriations rider *sub silentio* stripped Medicaid recipients of their vested statutory rights under § 1396k(b).

A month later, the Second Circuit decided *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir.), *petition for cert. filed* (April 19, 2002) (No. 01-1558). And on January 28, 2002, the First Circuit decided *Greenless v. Almond*, 277 F.3d 601 (1st Cir.), *petition for cert. filed* (U.S. April 29, 2002) (No. 01-16-35). Those courts skipped the Eleventh Amendment question and proceeded directly to Congress' 1999 amendment. On May 22, 2002, the Fourth Circuit decided this case.

Further fragmenting the jurisprudence among the circuits, on June 13, 2002, the Sixth Circuit decided *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002), holding that the Eleventh Amendment barred recovery by the Medicaid plaintiffs, directly contrary to the Tenth Circuit's decision in *Harris v. Owens* 264 F.3d 1282 (10th Cir. 2001) that the Eleventh Amendment was not a bar to such recovery. The Sixth Circuit erroneously reasoned that the Plaintiffs were seeking to recover monetary damages from the States in the form of a "present entitlement to future payment", therefore such relief was determined to be retrospective, and thus barred by the Eleventh Amendment.

While the Sixth Circuit and the Tenth Circuit are directly opposed to each other with respect to the Eleventh Amendment issue, other circuits, including the Fourth Circuit, are contradictory regarding the 1999 Congressional Amendment. Whereas the Seventh Circuit simply saw ambiguity and the Fifth Circuit simply saw a federal waiver, the First, Second, Tenth, and Fourth Circuits found clear and unambiguous

evidence that Congress had quietly and retroactively stripped millions of Medicaid recipients of their vested statutory rights under section 1396k(b). App. 16a-23a.

II. Congress' 1999 Emergency Appropriations Rider Does Not Reference, or Repeal, Section 1396k(b) or the Vested Rights Embodied Therein.

After intense lobbying by the States to prevent the federal government from claiming its share of the tobacco settlement as a Medicaid recovery, Congress included a rider to the Emergency Supplemental Appropriations Act of 1999 providing that HCFA would not treat tobacco settlement funds as an overpayment to the States for the purpose of offsetting future federal Medicaid matching funds. In other words, the federal government waived its claim to its share of the tobacco settlement.

The full text of the 1999 emergency appropriations rider is set forth in the Appendix at 137a. Subsection (A) expressly refers to the "share to which the United States is equitably entitled." Subsection (B)(i) then says simply that this federal "share" shall not apply to the tobacco settlement. Subsection (B)(ii) then says that States may "use the sums described in clause (i) [*i.e.*, the federal share of the tobacco settlement] for any expenditures determined appropriate by the State."

The First, Second, Fourth, and Tenth Circuits have now concluded—based solely upon the last sentence of the appropriations rider—that rather than simply waiving the federal government's rights to its share of the tobacco settlement, which is all Congress ever debated, the rider somehow lurched into distant sections of federal Medicaid law, *sub silentio* repealed § 1396k(b)—a section of the Medicaid Act 50 pages away in the United States Code—and

retroactively stripped Medicaid recipients of substantial vested rights without ever mentioning § 1396k(b) or Medicaid recipients. Such an interpretation bears neither logical nor constitutional scrutiny.

A. The Text and Context of the 1999 Appropriations Rider Demonstrate Plainly That Congress Waived Only the Federal Government's Share of the Tobacco Settlement.

Congress expressly understood the tobacco settlement to be a Medicaid recovery, subject to supreme federal Medicaid law—and then chose to treat the tobacco settlement proceeds in the section of federal Medicaid law dealing with how the federal government calculates annual Medicaid payments it will make to States. The straightforward text and context of the 1999 appropriations rider confirms that it concerns *only* the portion of the tobacco settlement to which the federal government would have been entitled.

Congress targeted one, and only one section of federal Medicaid law—the section previously enumerated 1396b(d)(3), which it renumbered 1396b(d)(3)(A) in 1999, and to which it added subsection B—thus expressly addressing only the "share to which the United States is equitably entitled." *See* 42 U.S.C. § 1396b(d)(3).[10]

Conspicuous as well is what Congress did *not* do—amend or repeal or even mention § 1396k(b)—which it easily could have done and would have been obliged to do if it intended such a radical divestiture of statutory property rights. Though "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439,

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[10] By definition, of course, and as discussed in greater detail *infra*, appropriations measures concern *only* money going into or coming out of the federal government. They do not, and generally *cannot*, affect substantive statutory provisions, much less effect a massive confiscation of property belonging to private citizens.

453 (1988), the 1999 appropriations rider never mentions section 1396k(b), never mentions Medicaid recipients, and never mentions any intent to repeal or affect any other portion of federal Medicaid law.

The title of the appropriations rider[11] reinforces the specific and limited scope of Congress' concern: "PROHIBITION ON TREATING ANY FUNDS RECOVERED FROM TOBACCO COMPANIES AS AN **OVERPAYMENT** FOR THE PURPOSES OF MEDICAID." *See Conference Report on 1999 Emergency Supplemental Appropriations Act*, 145 Cong. Rec. H3175, 3200 (emphasis added). The technical term "overpayment" applies specifically and exclusively to funds to which the federal government would otherwise be entitled.[12]

The Fourth Circuit effectively treated the last sentence of the appropriations rider as an independent statute, divorced from context and legislative history. Yet this Court has repeatedly emphasized that **text**—even assertedly "unambiguous" text—depends upon **context**. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of statutory text "but also its placement and purpose in the statutory scheme."); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Moreover, the Fourth Circuit's treatment of subsection (B)(ii) as an independent repeal of substantive Medicaid law

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[11] While not a dispositive feature of statutory construction, the title of an enactment may certainly point the way—especially where, as here, the title specifically signals the scope of the enactment, and no other textual evidence points *specifically* to a different or larger scope. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen v. Baltimore & Ohio RR. Co.*, 331 U.S. 519, 528-529 (1947)).

[12] This meaning of the term "overpayment" is expressly set forth in the statute itself, at § 1396b(d)(3)(A), which existed before the 1999 rider and was merely renumbered to add "(A)."

renders the 1999 appropriations rider bizarre. If Congress had truly intended to say that States were free to spend all of the tobacco settlement proceeds in whatever manner they pleased, notwithstanding the § 1396k(b) distribution rules or any other provision of federal law, then Congress could have enacted a statute that simply said that. Congress need never have concerned itself with the technical subject of "overpayments." If States can spend all of the money however they please, then *a fortiori* none of the tobacco settlement proceeds constitute "overpayments" or are otherwise subject to any federal equitable entitlement. In other words, the Fourth Circuit interpretation renders superfluous every word in the 1999 appropriations rider except for clause (B)(ii). There would have been no need for clause (B)(i) if indeed Congress intended to liberate the States to spend all of the tobacco settlement proceeds however they please, notwithstanding any contrary provision of federal law.

This Court recently reiterated the critical canon of statutory construction that forbids exactly what the Fourth Circuit (as well as the First, Second, and Tenth Circuits) did. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 24, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The question then naturally arises: why did Congress include language in subsection(B)(ii) that appears to free the States from constraint in spending tobacco settlement proceeds (or more precisely, the federal share of the tobacco settlement proceeds)? The answer, as the next section makes abundantly clear, is that the debate in Congress at the time of the 1999 enactment was on whether to give **the federal share** to the States without conditioning its use, or whether to give **the federal share** to States **with the stipulation that**

they must spend some or all of the federal share on specified health programs. Those favoring conditions on the federal share lost. The rider ultimately enacted made clear that the federal government would not dictate how States must spend **the federal share**, despite the federal government's "equitable entitlement" to a substantial part of the tobacco settlement.

B. The Legislative History of the 1999 Appropriations Rider Unambiguously Confirms That Congress Addressed Only the Federal Share of the Tobacco Settlement.

The Senators debating the federal treatment of the tobacco settlement divided roughly into two camps: one that wanted to let the States keep the federal government share and spend it however they wish; and another that wanted to let the States keep the federal government share, but make them spend it (or a portion of it) on salutary health programs.

Typical of the camp opposing the rider that was ultimately enacted, and instead favoring conditions on spending the federal share of the tobacco settlement, was this statement by Senator Kennedy:

> States are free to use **the state share** of their recoveries in any way they choose. However, Congress has a clear and compelling interest in how **the federal share** will be used.

145 Cong. Rec. S2889-S2890 (March 18, 1999) (statement of Sen. Kennedy). Congress' focus *only* on **the federal share**—and the debate over whether the federal government would dictate how the States must spend **the federal share**—could hardly be more plain.

Senator Harkin, who sponsored a competing amendment, likewise hammered the central theme of the debate: whether Congress should impose spending conditions on **the federal share** of the tobacco settlement:

> I don't want to tell the States what to do with their money, but when the Federal taxpayers provide over 50 percent of Medicaid monies to the States and we are paying 50 billion bucks a year in health-related costs and much of that through Medicaid, then I think **we have a right and an obligation to say that some portion of that money that is Federal money** ought to go for health-related purposes.

145 Cong. Rec. S2886 (March 18, 1999) (statement of Sen. Harkin).

The ultimately enacted appropriations rider merely confirmed who won that debate: States would not be told by Washington how to spend **the federal share** of the tobacco settlement, despite the federal government's acknowledged claim to a substantial percentage of the states' Medicaid recovery. Instead, States could use that money—that is, the **federal share** specifically under consideration—"for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii).

Most telling, the Conference Report concerning the appropriations rider expressly declares the subject of the enactment to be "**the Federal share of funds** recovered under [tobacco] settlements or judgments." Conference Report on 1999 Emergency Supplemental Appropriations Act, 145 Cong. Rec. H3175, 3200 (emphasis added).[13]

Senator Hutchison herself, the rider's chief sponsor, stated that the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**." 145 Cong. Rec. S1145, 1157 (emphasis

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[13] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

added). Similarly, in introducing the rider, Senator Gorton from Washington (a co-sponsor) described it thus: "I join my Senate colleagues in introducing this legislation to prohibit **the federal government from trying to recoup any funds** from state governments recovered from tobacco companies as part of their tobacco settlement **or from determining how these funds should be spent."** *Id.* at 1159 (emphasis added). Senator Leahy from Vermont (a co-sponsor) similarly described the rider as "legislation to prohibit the **Federal government from recouping** any part of the [tobacco] settlement"). *Id.* at 1161 (emphasis added). Senator Levin from Michigan (another co-sponsor) stated: "I will support an amendment to this bill which will keep in the states any so called **'federal share' funds**"). 145 Cong. Rec. S2342 (emphasis added).

Additionally, every one of the letters submitted to Senator Hutchison by state and local entities in support of the rider makes clear that the purpose of the rider, and the sole motivation for the intensive lobbying effort behind the rider, was to prevent recoupment of **the federal share** of the tobacco settlement, and that no part of the debate pertained to the Medicaid recipients' share.[14]

What is "plain," upon examination of the rider's text in its context, as amply reinforced by the legislative history, is that Congress treated **the federal share** of the tobacco

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[14] *See, e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that state tobacco settlement funds are protected from unwarranted **seizure by the federal government**"); letter from National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing **"federal recoupment"** and **"the federal government's claim"**); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco revenues"). 145 Cong. Rec. S1145, 1157-58.

settlement—nothing more, nothing less. The total silence of Congress with respect to § 1396k(b) and Medicaid recipients simply cannot yield a conclusion that Congress nevertheless stripped their substantive and vested rights in a sentence clearly rooted in the rights of the federal government vis-à-vis the States. As once observed by Chief Justice Rehnquist and appropriate here, "[i]n a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (internal quotations omitted) (quoted in *St. Cyr*, 533 U.S. at 320 n.44. Only judicial usurpation of a legislative function would now read § 1396k(b) out of the law by stealth.

C. Congress' 1999 Rider Could Not Properly Repeal Section 1396k(b) by Implication—Which Applies With Even Greater Force in an Appropriations Measure.

Whether reasonable minds may differ as to the meaning of the statutory text at issue, three observations about the 1999 appropriations rider are indisputable: (1) neither its text nor the legislative history ever mentions § 1396k or Medicaid recipients, much less discloses express intent to repeal that independent law or affect the rights of Medicaid recipients in any way; (2) the 1999 rider was an *appropriations* measure, to which specific rules and limitations apply in the task of interpretation; and (3) Petitioners' interpretation of the 1999 appropriations rider, as amply supported by textual cues and legislative history, is *at least* a plausible interpretation that harmonizes all relevant parts of federal Medicaid law. Taken together, these propositions yield a single conclusion consistent with controlling precedent: Congress did not strip Medicaid recipients of their section 1396k rights.

"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)) (citations and internal quotation marks omitted). "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *accord United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982). There is clearly no "positive repugnancy between the provisions" of section 1396k(b) and section 1396b(d)(3), as would be required for a finding of a legislative intent to repeal Section 1396k. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).[15]

Section 1396b(d)(3) and section 1396k(b) *can* be read in harmony, and therefore *must* be read in harmony. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1396b(d)(3) prohibits the reduction of future federal Medicaid payments to States based upon tobacco settlement proceeds, and then (a) imposes no specific restrictions on the States' ability to spend that *federal* portion of the settlement, and, stated differently, (b) imposes no specific restrictions on the States' ability to spend *their legal portion* of the settlement amount. Section 1396k(b) provides that an portion of the settlement amount that exceeds the state and

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[15] Technically, the First, Second, Fourth, and Tenth Circuit constructions of the 1999 rider constitute a "partial" implied repeal of section 1396k(b), as only rights with respect to the tobacco settlement are purportedly affected. The difference is irrelevant. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.").

federal government's Medicaid costs, and that is therefore neither the "federal" portion nor the States' "legal portion" of the settlement amount, shall go to the injured Medicaid recipients.

Any decision interpreting Congress' 1999 appropriations rider as anything other than a waiver of the federal government's share of the tobacco settlement proceeds creates a new and unprecedented principle of interpreting, and erasing, legislative enactments, and arrogates to the judiciary a function assigned to Congress by the most fundamental principles of our federalist form of government. *See Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1258 (Fed. Cir. 2000).

To the rigorous presumption against implied repeal, this Court has added an even more forceful condemnation of implied repeals in **appropriations** measures. *See especially TVA*, 437 U.S. at 190 (doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). In *TVA v. Hill*, this Court emphasized the significant practical danger of reading too much about substantive law into appropriations measures, upon which Congress itself has fastened strict limitations on scope. *Id.* at 190-91 (citing House Rule XXI(2) and Standing Rules of the Senate 16.4)

One authority described the critical federalist underpinning of this principle as follows:

> A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. ... Repeal in an appropriations statute, in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law. The appropriations language must leave no doubt about legislative intent, like stating that no funds may be

> available to implement a previously authorized purpose, "notwithstanding" stated portions of the law identified in the appropriations bill.

L. Fisher, Statutory Construction: Keeping a Respectful Eye on Congress, 53 SMU L. Rev. 49, 61 (Winter 2000) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *accord Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Nothing in the 1999 appropriations rider even remotely satisfies these conditions for implied repeal in an appropriations measure.

Any determination that Congress' rider to the 1999 Emergency Supplemental Appropriations Act somehow repealed the disbursement requirements contained in section 1396k(b) would (1) erroneously disregard the rigorous presumption against repeals by implication, *and then* (2) erroneously assume "that Congress meant to repeal *pro tanto* § [1396k(b)] of the [Medicaid] Act by means of a procedure expressly prohibited under the rules of Congress," *TVA*, 437 U.S. at 191, *and then* (3) erroneously insist that Congress did this remarkable deed without ever even mentioning § 1396k(b) or the rights embodied therein.

This case, perhaps even more than *TVA v. Hill* with which it irreconcilably conflicts,demands application of the principle that appropriations measures cannot repeal substantive law located fifty pages away in the United States Code without any hint of intention to do so.

D. Interpreting Congress' 1999 Appropriations Rider to Destroy Medicaid Recipients' Vested Remainder Rights Poses Serious Constitutional Problems and Must Therefore Be Avoided.

Under the law that existed when the MSA was executed (and, Petitioners contend, still exists), Petitioners and others similarly situated acquired a § 1396k(b) right to the remainder of the States' Medicaid recovery. Thereafter, Congress enacted §1396b(d)(3). In the Fourth Circuit's

view, Petitioners lost that extraordinarily valuable property right—though Congress never mentioned any intent to affect Medicaid recipients at all, much less extinguish their entitlement to future proceeds of an executed settlement.[16] Such a result impermissibly operates retroactively *and* works an unconstitutional taking—infirmities easily avoided by doing what this Court commands in the first instance: harmonizing two statutes where that is fairly possible.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (internal quotations omitted). Assuming only *arguendo* that Congress had the power even *expressly* to repeal the disbursement provisions of § 1396k for purposes of the tobacco settlement,[17] it did no such thing.

"[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The most rudimentary threshold for such "clarity" would require, at a minimum, express identification of (a) the specific right to be stripped; and (b) the class of people whose substantive rights are to be stripped. Congress identified neither. Indeed, this Court has

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[16] There can be no dispute that the § 1396k(b) remainder interest is a protected property interest. Among other indicia, state law routinely recognizes the competing property interests in recoveries by Medicaid recipients. *See, e.g., Roberts v. Total Health Care*, 349 Md. 499, 513, 709 A.2d 142, 148 (1998) ("To the extent the settlement proceeds were intended to compensate for medical care they were not the property of the [Medicaid] recipients."). Here, Congress adds its express imprimatur through § 1396k(b).

[17] For purposes of assessing the constitutionality of confiscating Petitioners' § 1396k(b) remainder interest, it is irrelevant that the precise amount due cannot yet be quantified. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

observed that cases where it "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

As this Court recently emphasized, statutes must be interpreted to avoid *not* merely unconstitutional results, but "difficult constitutional questions." *St. Cyr*, 533 U.S. at 300 & n.13. Where, as clearly here, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems." *Id.* at 300. The threshold constitutional proposition—that § 1396k(b) confers on Petitioners a vested property interest that § 1396b(d)(3) would extinguish by stealth according to some circuits—raises a sufficient constitutional problem to opt against reading § 1396b(d)(3)(ii) in a vacuum. And, more to the point, no such reading and no such interpretive entanglement is necessary, as the alternative construction pressed herein is more than "fairly possible."

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed May 22, 2002]

No. 01-1175

LOIS STRAWSER, *et al.*,
Plaintiffs-Appellants,

v.

NANCY V. ATKINS, *et al.*
Defendants-Appellees.

Appeal from the United States District Court
for the District of West Virginia, at Charleston

No. 01-1557

STEPHEN ALBERT JOSEPH, JR., *et al.*,
Plaintiffs-Appellants,

v.

CHARLES M. CONDON, *et al.*,
Defendants-Appellees

Appeal from the United States District Court
for the District of South Carolina, at Greenville

No. 01-2245

HILDA WHITE, *et al.*,
Plaintiffs-Appellants,

v.

MICHAEL EASLEY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of North Carolina, at Statesville

AFFIRMED

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:
Richard Cushing Donovan, Clerk

/s/_____
Deputy Chief Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed May 22, 2002]

No. 01-1175

LOIS STRAWSER, *et al.*,
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v.

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Appeal from the United States District Court
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Appeal from the United States District Court
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No. 01-2245

HILDA WHITE, *et al.*,
Plaintiffs-Appellants,

v.

MICHAEL EASLEY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of North Carolina, at Statesville

AFFIRMED

Before JUSTICES MOTZ and TRAXLER, Circuit Judges, and W. Craig BROADWATER, United States District Judge for the Northern District of West Virginia, sitting by designation.

OPINION

These appeals grow out of a 1998 settlement of litigation that many states brought against a group of major tobacco companies. West Virginia, North Carolina, and South Carolina, like all other states participating in the settlement, stand to receive substantial funds pursuant to it. Residents of each of those states, who have received Medicaid assistance for medical problems related to tobacco, filed suit to obtain a share of the funds their respective states will receive under the settlement. In each case, the district court dismissed the

patients' complaints on multiple grounds. Because federal law bars the claims, *see* 42 U.S.C.A. § 1396b(d)(B)(ii) (West Supp. 2001), we affirm the judgment of the district court in each case.

I.

These cases concern the relationship between the Medicaid program, which provides funds for health care for poor people, and the 1998 tobacco settlement. To facilitate understanding of the issues involved, we briefly describe the relevant federal and state Medicaid law, the litigation and 1998 settlement between the states and the tobacco companies, and the claims raised in these appeals.

A.

In the United States, a person who cannot pay his or her medical bills may be eligible for financial assistance under the Medicaid program. If so, and if the states in which the person lives participates in the federal Medicaid program, both the federal government and the government of his or her state contribute through the program to pay some of the medical bills. *See* 42 U.S.C.A. §§ 1396, 1396a-1396u (1992 & West Supp. 2001). West Virginia, North Carolina, and South Carolina all participate in the Medicaid program and receive federal funds under the program. *See* N.C. Gen. Stat. § 108A-54 (1999); W. Va. Code Ann. §§ 9-1-1 to 9-2-3 (Michie 1998 & Supp. 2001); S.C. Code Ann. § 43-7-20, 43-7-410 to 43-7-460 (Law. Co-op. 1985 & Supp. 2001).

In some instances, third parties are liable for the health-care expenses of Medicaid patients, through, for example, insurance, tort liability, or a court order based on familial obligation. To obtain federal assistance with Medicaid costs, a state must require Medicaid recipients to assign any rights they possess against such third parties to the states, and must make reasonable efforts to collect on all third-party claims that are assigned. *See* 42 U.S.C.A. §§ 1396a(a)(25), 1396k(a) (West 1992 & Supp. 2001). In keeping with these

federal requirements, West Virginia, North Carolina, and South Carolina each mandate such an assignment. *See* W.Va. Code Ann. § 9-5-11(a) (Michie 1998); S.C. Code Ann. §§ 108A-57, 108A-59(a) (1999).

Federal law also governs a participating state's distribution of any recovery on a third-party claim assigned by a Medicaid recipient. If a state recovers "under an assignment," payments from third parties go first to the state up to its relevant Medicaid expenses; then to the federal government, up to its relevant Medicaid expenses (minus an incentive payment to encourage the state to collect, *see* 42 C.F.R. § 433.153 (2001)); and finally, if any funds remain, to the patient who assigned the claim. *See* 42 U.S.C.A. § 1396k(b); *see also* 42 C.F.R § 433.1543 (2001). A state must distribute any remainder to the individual Medicaid recipient. *See* 42 U.S.C.A. § 1396k(b) (requiring that after both governments cover all of their expenses, "the remainder of such amount collected *shall* be paid to such individual" (emphasis added)).

B.

In the 1998 settlement of the tobacco litigation, each settling state recovered a substantial amount of money from tobacco companies. In many of the settling states, including West Virginia, North Carolina, and South Carolina, Medicaid patients then brought suit against state officials.[1]

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[1] Every federal appellate court to consider similar patients' claims has rejected them. *See Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002); *Tyler v. Douglas*, 280 F.3d 116 (2d Cir. 2001); *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001); *McClendon v. Georgia*, 261 F.3d 1252 (11th Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000); *see also Watson v. Texas*, 261 F.3d 436 (5th Cir. 2001) (addressing similar claims based on a separate settlement between Texas and the tobacco companies); *Table Bluff Reservation (Wiyot Tribe) b. Philip Morris, Inc.*, 256 F.3d 879 (9th Cir. 2000) (ruling that Indian tribes lacked standing to challenge the tobacco settlement). The district courts have also uniformly rejected such claims in cases too numerous to list.

The patients contend that at least part of the tobacco settlement constituted a Medicaid recovery subject to the statutory framework outlined above. Therefore, they argue, state officials should distribute excess funds recovered under the settlement to them. Before analyzing these contentions, we describe the nature of the state lawsuits against tobacco companies and the settlement reached.

1.

In the 1990s, nearly all the states sued major tobacco companies for harm arising from the deliberate concealment of the health risks posed by tobacco.[2] In their complaints, West Virginia, North Carolina, and South Carolina all cited the medical costs of treating smoking-related injuries as a major source of damages.

West Virginia filed suit on September 20, 1994. the state's third amended complaint lists a number of tobacco harms to the state, including its expenses in treating tobacco-related health problems, its expenses in countering tobacco advertising aimed at young people, products-liability claims, and antitrust violations. The complaint includes fourteen counts; several discuss damage to the state other than health-care costs, such as the cost of public campaigns about the dangers of tobacco, and pursue relief other than the money the state had spent on health-care costs.

South Carolina filed suit on May 12, 1997. Preliminary language in its amended complaint describes only the medical expenses the state had incurred. The complaint

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[2] The states and tobacco companies participating in the tobacco settlement have varied over time. *See, e.g., Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (considering the claims of a tobacco company facing a choice as to whether to participate in the settlement); *infra* (noting North Carolina's decision to join the settlement after it had been executed). Because nothing turns on these details in these appeals, we have not attempted to specify which tobacco companies and states were involved at any given point.

includes sixteen counts. The only harm to South Carolina discussed in any of the counts is the cost of medical treatment for tobacco-related health problems. However, South Carolina did seek an order requiring the tobacco companies to fund a campaign of public education about smoking and health, as well as orders barring them from marketing and sales practices aimed at minors and requiring them to disclose information related to tobacco.

North Carolina filed suit on December 21, 1998. (North Carolina's lawsuit actually followed the execution of the settlement between the tobacco companies and many other states by several weeks; on the same day, the state both filed suit and immediately dismissed its suit in order to join the settlement.) The complaint included two state-law claims, for restraint of trade and unfair commercial practices. The state cited the financial harm that the shrinking tobacco market inflicted on its communities that depended on growing tobacco and health-care costs incurred in treating smoking-related illnesses. It sought damages "for the past and future medical costs paid by North Carolina to medical assistance beneficiaries, state employees, and others for treatment of tobacco-related illnesses." The state also sought injunctions and "mandatory orders" to bar tobacco advertising and tobacco-related conspiracy and to provide funds for public education about the dangers of tobacco and for financial assistance to "tobacco-dependent communities."

2.

Late in 1998, without admitting liability, the tobacco companies settled the claims of West Virginia, North Carolina, South Carolina and most other states. In a document entitled "Master Settlement Agreement") (MSA), the companies agreed to pay billions of dollars to the states in future installments. Under the MSA, settlement funds went into escrow, with Citibank as the escrow agent. The total amounts involved cannot be fixed exactly, but the patients pursuing these cases allege that West Virginia

expects to receive $1.933 billion, South Carolina $2.3 billion, and North Carolina $4.6 billion, and that these payments exceed what each state has paid and expects to pay for Medicaid costs related to tobacco.

In return for these funds, the states released their rights to pursue a wide range of claims against the tobacco companies. The states released the companies from liability based on their past conduct and from future monetary liability arising solely from use of or exposure to tobacco. Some of the claims released by the states did not related to health-care costs; the MSA covered all claims "directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing, or health effects of, (B) the exposure to, or (C) research, statements or warning regarding, Tobacco Products."

West Virginia, North Carolina, and South Carolina have all received payments under the MSA. A South Carolina statute assigns all MSA receipts to a Tobacco Settlement Revenue Authority created by the statute, which issues bonds (though not to South Carolina) and pays their proceeds to various trust funds. S.C. Coe Ann. § 11-49-50, 11-49-70 (Law. Co-op. Supp. 2001). Similarly, a North Carolina statute assigns 50% of that state's MSA funds to a non-profit corporation called The Golden L.E.A.F. (Long-term Economic Advancement Foundation) to provide financial assistance to tobacco-dependent areas of North Carolina. *See* 1999 N.C. Sess. Laws 2, *available at* http://www.ncga.state.nc.us/SessionLaws/1999_/s119990002/default.htm (last visited April 11, 2002).

In 1999, after the tobacco settlement had been reached, Congress passed an amendment to federal Medicaid law that specifically addresses the MSA, in a section of an emergency appropriations act, entitled "Prohibition on Treating Any Funds Recovered From Tobacco Companies as an Overpayment for Purposes of Medicaid." *See* 1999

Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57, 103-04, *codified at* 42 U.S.C.A. § 1396b(d)(3)(B) (West Supp. 2001). Congress addressed the tobacco settlement in two provision that altered the usual manner for distribution of recovery on third-party claims. *See* 42 U.S.C.A. § 1396b(d)(3)(B)(i, ii).

The first provision exempts the tobacco settlement from the usual statutory payment scheme for state reimbursement of federal Medicaid costs. Ordinarily, a state reimburses the federal government by designating the federal share of a recovery as party of an "overpayment" on the federal obligations under Medicaid, to be repaid to the federal government. *See* 42 U.S.C.A. §§ 1396b(d)(2)(A), (2)(B), (3)(A) (West Supp. 2001). Under the 1999 amendment, however, Congress directed that this procedure

> shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products ... and State Attorneys General [the MSA], or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

42 U.S.C.A. § 1396b(d)(3)(B)(ii). We refer to this provision herein as "clause (ii)."

C.

By April 26, 2000, Medicaid patients suffering from tobacco-related illnesses had filed the three similar amended complaints against official in West Virginia, North Carolina,

and South Carolina, which form the basis for these appeals.[3] In these complaints, the patients seek a share of the MSA funds received by their respective states, under the theory that the Medicaid recovery provisions described above apply to the MSA settlement, and that they have a right to payments in excess of the states' actual Medicaid expenses. Specifically, proceeding under 42 U.S.C.A. § 1983, the Medicaid patients allege that state officials violated provisions of the Medicaid statute that require states to disburse excess funds to individual recipients, *see* 42 U.S.C.A. § 1396a(a)(25). They further allege that these asserted deprivations violate the Due Process Clause and the Takings Clause.

By suing state officials rather than the stateitself, the patients seek to invoke the *Ex parte Young*, 209 U.S. 123 (1908), exception to the Eleventh-Amendment immunity of the states. The patients ask for a declaratory judgment of their rights and their state's obligations under federal Medicaid law, and injunctive relief requiring state officials *inter alia* to "disburse ... or to cause the disbursement" of the MSA settlement funds that assertedly belong to the patients. In each case, the district court dismissed the patients' claims on multiple grounds. *See Strawser v. Lawton*, 126 F. Supp. 2d 994 (S.D. W.Va. 2001); *Joseph v. Condon*, No. 00-324 (D.S.C. Mar. 19, 2001) (opinion and order dismissing the case with prejudice); *White v. Hunt*, No.

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[3] For ease of reference, we often refer within to the individual state defendants as "the states"." The patients in all three cases also filed suit against Citibank, the escrow agent for the MSA, and the North Carolina patients sued the nonprofit organization that received a share of the state's funds from the tobacco settlement, The Golden L.E.A.F. Both The Golden L.E.A.F. and Citibank make a number of arguments on the merits in their own behalf. Because we rule that the patients have no claim at all to the MSA funds paid to the state, and because the patients' claims against the non-state defendants are derivative of their other claims, we need not address the specific arguments made by The Golden L.E.A.F. or Citibank.

00-14 (W.D.N.C. Sept. 25, 2001) (same); *White v. Hunt*, No. 00-14, 2000 WL 33261006 (W.D.N.C. July 13, 2000) (magistrate judge's report and recommendations).

These appeals followed. Our review is *de novo*. *See TWFS, Inc. v. Schaefer*, 242 F.3d 198, 204 (4th Cir. 2001); *Lynn v. West*, 134 F.3d 582, 585 (4th Cir. 1998). We heard oral argument in all three cases. Because of the identical central issues presented in each, however, we resolve all three appeals in this single opinion.

II.

The patients' central contention is that the usual provisions for distribution of Medicaid recoveries apply to the funds the states receive from the MSA, so that under 42 U.S.C. §1396k(b), they have a federal right to a share of those funds. The state officials respond that the district court in each case properly dismissed the complaints because, for numerous reasons, the complaints fail to state a claim on which relief can be granted and, in any event, the state officials enjoy Eleventh-Amendment immunity from these lawsuits. Each district court made rulings on both grounds, and, in particular, each ruled that the 1999 amendment to the Medicaid statute bars any claim by the patients to part of

their respective states' shares of the tobacco settlement.[4] We affirm on that basis.

A.

Even though generally "[q]uestions of jurisdiction ... should be given priority," and some courts have held that the Eleventh Amendment constitutes such a jurisdictional bar, *see Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778 (2000) (discussing circuit split), in this case, we can properly base our holding on the plain language of the 1999 amendment to the Medicaid statute without resolving the Eleventh-Amendment question. This is so for two reasons.

First, the limited nature of our holding permits this. In *Vermont Agency*, the Supreme Court specifically held it "appropriate" to determine whether a statute permitted a cause of action against the states without resolving an Eleventh-Amendment question. *Id.* at 779-780. The Court explained that the statutory question was both "logically antecedent" to the Eleventh-Amendment question and so limited that there was no "realistic possibility that

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[4] Although the United States District Court for the District of South Carolina did not explicitly dismiss the suit before it for failure to state a claim, two of the court's rulings addressed the merits. First, the court ruled that South Carolina had not violated federal law in any respect; although the court handled that determination as an Eleventh-Amendment issue under *Ex parte Young*, it more properly constitutes a determination on the merits. *See Harris*, 264 F.3d at 1289; *TWFS*, 242 F.3d at 204-06; *Booth v. Maryland*, 112 F.3d 139, 143-43 (4th Cir. 1997). The court also concluded that "Congress has relieved states participating in the MSA of any obligation to disburse funds to Medicaid recipients pursuant to § 1396k(b) of the Act" and that therefore "Plaintiffs have been deprived of no right or privilege secured by the Act" and "§ 1983 is not implicated in the within action." In any case, of course, we may affirm on any ground revealed in the record. *See, e.g., Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439 n.9 (4th Cir. 1999) (quoting *PHP Healthcare Corp. v. EMSA Ltd. P'ship*, 14 F.3d 941, 945 (4th Cir. 1993)).

addressing" it could "expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id.* at 779. *Cf. BellSouth Telecomms., Inc. v. North Carolina Utils. Comm'n*, 240 F.3d 270, 275-76 (4th Cir. 2001) (ruling that a federal court may not avoid ruling on an assertion of Eleventh-Amendment immunity while permitting a case to proceed). Even if the statutory question here is not as plainly "logically antecedent" to the Eleventh-Amendment question,[5] it provides the basis for an even more limited holding than that in *Vermont Agency*. That case held that individual plaintiffs could obtain *no* relief of any type from the states under a particular federal statute (31 U.S.C.A. § 3729(a) (West Supp. 2001)); we merely hold that individual plaintiffs cannot obtain *certain* relief (tobacco settlement funds) from the states under a particular federal statute (42 U.S.C.A. § 1396k(b)). Thus, as in *Vermont Agency*, resolution of the statutory question here does not involve a court in "pronounc[ing] upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry." *Vermont Agency*, 529 U.S. at 799.

Second, and independent of the limited nature of our holding, the states' litigating position renders it appropriate to resolve these cases on the basis of the Medicaid statute. Both in their briefs and at argument the states have relied on the contention that the 1999 amendment bars the patients' claims, as well as their Eleventh-Amendment defense. Although at oral argument counsel for the state officials carefully refrained from in any way waiving that defense, they did not insist on it. Thus, like the state official in

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[5] The statutory question here well may be just as "logically antecedent" to the constitutional question; the statutory question in this case is in the nature of an affirmative defense. Courts often base their holdings on an affirmative defense without even resolving the existence of a cause of action. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (1990), and the many cases cited therein.

McClendon, the officials here argue the merits and rely "upon that defense only if it is necessary to prevent judgment against them on the merits." 261 F.3d at 1238. The Eleventh Amendment can be waived by a party, *see, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999), and so does not automatically divest a court of jurisdiction. *See Wisconsin Dept. of Corr. v. Schact*, 524 U.S. 381, 389 (1998). The states' restricted use of the Eleventh-Amendment defense here provides another reason permitting us "to decide in their favor on the merits." *McClendon*, 261 F.3d at 1258.

Additionally, we note that avoiding the constitutional question and resolving this case on the merits – on the basis of the 1999 amendment to the Medicaid statute – well accords with the venerable principle that a court will not decide a constitutional question, particularly a complicated constitutional question, if another ground adequately disposes of the controversy. *See INS v. St. Cyr*, 533 U.S. 289, 299-301 & n.13 (2001); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).[6] While the statutory question here is easy, several courts have concluded that the Eleventh-Amendment question presents real difficulty. *See Greenless*, 277 F.3d at 607; *Tyler*, 280 F.3d at 121; *Floyd*, 227 F.3d at 1034-35. In fact, no circuit has upheld the states' contention that the *Ex parte Young* exception does not apply. *See Harris*, 264 F.3d at 1288-94 (expressly holding that an *Ex parte Young* exception is available); *Greenless*, 277 F.3d at 606-08 (holding on the merits); *Tyler*, 280 F.3d at 121 (same); *McClendon*, 261 F.3d at 1256-59 (same); *Floyd*, 227 F.3d at 1034-35 (same).

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[6] We recognize that this principle does not permit a court to refrain from resolving a disputed question as to Article III jurisdiction, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-100 & n.3 (1998), but no party contends that this case involves any lack of Article III jurisdiction.

For these reasons, we can and do resolve this case on the merits, without reaching the Eleventh-Amendment question.

B.

Resolution of the patients' claims on the merits is straightforward. But for an exception that is irrelevant here for litigation costs proscribed by 42 U.S.C.A. § 1396b(i)(19), the 1999 Medicaid amendment expressly provides that "a State may use amounts recovered or paid to the state" under the MSA "for any expenditures determined appropriate by the state." *See* 42 U.S.C.A. § 1396b(d)(3)(B)(ii). The states argue that the permission to use the funds freely applies to *all* "amounts recovered or paid to" them under the tobacco settlement, and that it therefore extinguishes the rights of individual Medicaid recipients under 42 U.S.C.A. § 1396k(b), with respect to tobacco-settlement funds alone. The patients respond that the permission to undertake "any expenditures determined appropriate by the state" applies only to the funds that the federal government itself relinquished. The statutory text supplies a clear answer.

The relevant statutory language in clause (ii) provides that:

> a State may use amounts recovered or paid to the state as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the state.

42 U.S.C.A. § 1396b(d)(3)(B)(ii). Clause (i), meanwhile, provides that certain provision under which the federal government ordinarily recoups its chare of a Medicaid recovery

> shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products ... and State Attorneys General [the MSA], or as part of any individual State settlement or

> judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

42 U.S.C.A. § 1396b(d)(3)(B)(i). Clause (i) thus discusses an "amount," the MSA itself, and "individual state settlement[s] or judgment[s]."

The patients' theory rests on two propositions. First, they assert that in clause (ii), the phrase "described in clause (i)" modifies "amounts," not "settlement, or ... judgment." According to the patients, clause (ii) only provides the states federal permission to do what they like with "amount...described in clause (i)," whatever those might be. Second, the patients contend that the "amounts...described in clause (i)" constitute only "the federal share of the tobacco settlement," not all the money recovered. Thus, the permission granted in clause (ii) applies only to the federal share of the MSA, leaving the individual claims under § 1396k(b) intact.

Neither proposition is tenable. First, clause (ii)'s term "described in clause (i)" is better read to modify "settlement, or ...judgment." Clause (ii) provides that "a State may use amounts recovered or paid to a state as part of a comprehensive or individual settlement, or a judgment, described in clause (i)" as it likes. It is the phrase "settlement, or... judgment" that would be vague without the modifier directing the reader to clause (i), not the phrase "amounts recovered or paid to the state." An amount recovered or paid to a state under a settlement or judgment is the incoming money, plainly. Meanwhile, without more, "a comprehensive or individual settlement, or a judgment," is much broader than the scope of the 1999 amendment. The modifier is only necessary for the latter.

Moreover, even if the phrase "described in clause (i)" did modify "amounts," the "amount" that clause (i) itself discusses is "*any* amount recovered or paid to a State" as a result of the MSA or other tobacco settlements – not just the federal share. *See Tyler*, 280 F.3d at 122-23; *Harris*, 264

F.3d at 1295-96; *Strawser*, 126 F. Supp. 2d at 1000. This is true even though clause (i) itself functions to exempt such amounts from the ordinary processes by which the states repay the federal government for its share of Medicaid expenses. We thus reject both propositions supporting the patients' reading of clause (ii).

Turning to the impact of clause (ii) on the patients' claims in these cases, we consider its statement that "a State may use amounts recovered or paid to the state" under the MSA "for any expenditures determined appropriate by the state." This provision permits a state to use "amounts recovered or paid...for *any* expenditure," and does not qualify the term "amounts." There is no ambiguity in this sentence: Congress declares that the states may spend any money they receive under the MSA on any expenditure. *See Greenless*, 277 F.3d at 609 ("Congress made its intent clear in the amendment."); *Tyler*, 280 F.3d at 124 ("[T]here is no ambiguity in the language of § 1396b(d)(3)(B)(ii)."); *Harris*, 264 F.3d at 1295.[7]

C.

Notwithstanding the clarity of this language, the patients offer several reasons why we should ignore it.

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[7] The West Virginia patients argued unsuccessfully below that the 1999 amendment raised problems of retroactivity. *See Strawser*, 126 F. Supp. 2d at 1002 n.5. Neither they nor the South Carolina patients press this argument in their briefs on appeal. The North Carolina patients do press such an argument on appeal, but they failed to preserve it in objecting to the magistrate judge's recommendation of dismissal. *See* 28 U.S.C.A. § 636(b)(1) (West 1993); *Praylow v. Martin*, 761 F.2d 179, 180 n.1 (4th Cir. 1985) (ruling that an issue is waived where no specific objection is filed). Accordingly, we need not and do not reach it; we note, however, that two of our sister circuits have expressly rejected such an argument. *See Greenless*, 277 F.3d at 609 (rejecting a retroactivity argument against application of the 1999 amendment); *Harris*, 264 F.3d at 1296-97 (same).

1.

First, they maintain that the legislative history, the title, and the context of the 1999 amendment require rejection of its clear language.

Even if it were appropriate to consider legislative history when the statutory text is plain, and it is not, the legislative history here does not contradict the statutory text; indeed, the legislative history does not even mention individual Medicaid recipients. *See Tyler*, 280 F.3d at 124; *Harris*, 264 F.3d at 1297. Rather, the legislative history of the 1999 amendment describes, without reference to individual patients, the existence and nature of a federal right to a share of the MSA. The patients actually emphasize this silence, suggesting that it supports them, because the legislative history does not expressly discuss the states' entitlement to all funds from the tobacco litigation here. However, total silence on a point is far from the "substantial, unambiguous evidence" necessary for a court to consider reaching "a contrary interpretation" of clear statutory language. *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 430 (4th Cir. 1981).

The title of the amendment similarly contains no mention of the rights o individual Medicaid patients. That title – "Prohibition on Treating Any Funds Recovered From Tobacco Companies as an Overpayment for Purpose of Medicaid" – instead simply refers to "an overpayment," the term of art used for refunding state money to the federal government in this context. *See* 42 U.S.C.A. §§ 1396b(d)(2)(A), (2)(B), (3)(A). Nor, contrary to the patients' suggestion, does the 1999 amendment's context – the amendment's "distance" of 113 pages in the U.S.C.A. from § 1396k(b), under which the patients seek to recover – affect the amendment's legal import.

In short, we agree with the states (and with the First, Second, and Tenth Circuits) that the plain language of the Medicaid statute, specifically the 1999 amendment, permits the states to do whatever they like with all "amounts

recovered" under the MSA, that is, with all the money they derive from it. *See Greenless*, 277 F.3d at 605-09; *Tyler*, 280 F.3d at 121-24; *Harris*, 264 F.3d at 1294-97; *see also McClendon*, 261 F.3d at 1262 (Noonan, J., concurring in the judgment).[8]

2.

The patients next contend that to find the 1999 amendment dispositive, we must conclude that it repealed § 1396k(b) by implication, a conclusion that they say we should be extremely reluctant to draw. The plain language of the 1999 amendment does necessarily signal a marked departure from § 1396k(b)'s general requirement for the final distribution of monies to individual Medicaid recipients. *See Greenless*, 227 F.3d at 609 n.89; *Strawser*, 126 F. Supp. 2d at 1000 n.4. And courts do indeed disfavor repeals by implication. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Rodgers v. United States*, 185 U.S. 83, 87-88 (1902). But we do not believe that the 1999 amendment repeals § 1396k(b) by implication.

In support of their contrary view, the patients cite only cases involving repeals of entire statutes or rules. *See, e.g., United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) ("[T]he expectation that there would be some

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[8] At oral argument the patients contended that the district courts had improperly overlooked their claims under the Takings Clause. *See* U.S. Const. amend. V. Their briefs in this court make no Takings Clause argument; nor have they asserted that the 1999 amendment itself constitutes or unconstitutionally authorizes a taking. *Cf.* Joseph Reply at 12 ("American citizens cannot be stripped of their statutory rights *sub silentio*"); White Reply at 19 (addressing whether Congress wished "to take private property" in an argument about how "courts may properly interpret acts of Congress"). The states contend that, regardless of the effect of the 1999 amendment on their use of MSA funds, the tobacco settlement did no resolve and had no effect on individual claims against the tobacco companies, which remain viable in separate actions. *See also McClendon*, 261 F.3d at 1261-62; *Floyd*, 227 F.3d at 1033-34, 1037. in light of our disposition of these appeals, we need take no position on that issue.

expression of an intent to 'repeal' is particularly strong in a case . . . in which the 'repeal' would extend to virtually every case to which the statute had application."); *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 133 (2d Cir. 1992) (noting that finding a repeal would be "a quite significant modification" of a general rule). By contrast, the effect of the 1999 amendment is highly specific. The amendment does not repeal the general operation of § 1396k(b). *See Greenless*, 277 F.3d at 608. Every Medicaid recipient – except those seeking tobacco money from the states – has the same rights under § 1396k(b) after the 1999 amendment as he or she had before it.

Rather than repeal by implication a general statute (§ 1396k(b)), the 1999 amendment simply created a specific, discrete exception to that statute. *See Harris*, 264 F.3d at 1296 (ruling that the 1999 amendment "simply addresses one particular application and carves out an exception"). "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner v. United States*, 195 U.S. 100, 125 (1904) (citations omitted); *see also Stewart v. Zsmith*, 673 F.3d 485, 492 (D.C.Cir. 1982) ("When one statute speaks in general terms while the other is specific, conflicting provisions may be reconciled by carving out an exception from the more general enactment for the more specific statute."); 1A Norman J. Singer, *Sutherland Statutory Construction* § 23:16 (6th ed. 2002); *cf. Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) ("In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies."). Although the 1999 amendment conflicts with § 1396k(b) with respect to individual recovery under the tobacco settlement, "[b]oth will be given effect if the general language of [§ 1396k(b)] be construed as applying generally, and [the 1999 amendment] be construed as creating an

exception to its general application." *Niagara Fire Ins. Co. of New York v. Raleigh Hardware Co.*, 62 F.2d 705, 709 (4th Cir. 1933); *see also Greenless*, 277 F.3d at 608-09 (rejecting a repeal-by-implication argument); *Harris*, 264 F.3d at 1296 (same).

Finally, the patients contend that because the 1999 amendment was part of an emergency appropriations rider, we should be even more reluctant to hold that it affects an earlier substantive statute. Again, we agree as a general matter: "According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws . . . . [T]he doctrine disfavoring repeals by implication is said to apply 'with full vigor' when the subsequent law is an appropriations measure." *City of Los Angeles v. Adams*, 556 F.2d 40, 48 (D.C. Cir. 1977) (citations omitted); *see also TVA v. Hill*, 437 U.S. 153, 189-90 (1978). The Supreme Court has ruled, however, that despite legislative rules to the contrary, Congress may "accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555 (1940) (citations omitted), *cited approvingly in United States v. Will*, 449 U.S. 200, 221-24 (1980); *see also* 1A Singer, *Sutherland Statutory Construction*, § 23:17 ("A purpose to repeal substantive provisions in earlier statutes may be manifested by provision in subsequent appropriation acts directing what use may be made of funds in relation to the subject dealt within in the earlier act.").

If two statutes can otherwise be reconciled, a court should not read a later amendment as an exception to an established general statute. *See TVA*, 437 U.S. at 189-93. But as any child with an allowance knows, permission to use money "for any expenditure" clearly conflicts with a mandate to give some of the money to someone else. "Where Congress chooses" to amend substantive law in an appropriations rider, "we are bound to follow Congress's last word on the

matter even in an appropriations law." *City of Los Angeles*, 556 F.2d at 49. With respect to the tobacco settlement, Congress has spoken, and spoken clearly.

III.

In sum, we hold that 42 U.S.C.A. § 1396b(d)(3)(B)(ii) bars any recovery by individual Medicaid recipients to a share of the money the states receive under the Master Settlement Agreement.[9] The judgments of the district courts are therefore

AFFIRMED.

[9] In addition to the ground on which we rule, the states argue that individual Medicaid recipients only assigned their third-party claims to the states up to the amount the states had spent on their care; that the states did not sue the tobacco companies on behalf of individual Medicaid recipients; that the MSA did not resolve claims that individual Medicaid recipients might have against the tobacco companies; that the tobacco settlement did not constitute a Medicaid recovery at all, so neither the federal government nor individual recipients had any right to any of its funds; that the state officials have no authority under the state law to disburse MSA funds; and that even if the MSA constituted a Medicaid recovery in part, any money the states received in the tobacco settlement was for non-Medicaid claims that were settled in the MSA, so no excess exists to be refunded under 42 U.S.C.A. § 1396k(b). We need not address these arguments given our disposition of these appeals.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Civil Action No. 5:00CV14-V

HILDA WHITE, *et al.*,

Plaintiffs,

v.

JAMES B. HUNT, JR., *et al.*,

Defendants.

MEMORANDUM AND ORDER

THIS MATTER is before the Court on three motions to dismiss: The "State Official Defendants' Motion to Dismiss" filed March 13, 2000; the Golden L.E.A.F., Inc.'s "Motion to Dismiss" filed March 13, 2000; and "Motion of Defendant Citibank, N.A. to Dismiss Complaint" filed June 2, 2000. Memoranda in support were filed with each motion.

Pursuant to 23 U.S.C. § 636(b)(1)(A) and the standing order of designation, this Court referred the case to Chief United States Magistrate Judge Carl Horn for recommended disposition. Ina Memorandum and Recommendation and Order" filed July 13, 2000, Magistrate Horn recommended that all three motions to dismiss be granted. Plaintiffs filed Objections to the "Memorandum and Recommendation and

Order" on July 21, 2000, which are deemed to be timely and are considered herein.

I. STANDARD OF REVIEW

The Federal Magistrate Act provides that "a district court shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Keeler v. Pea, 782 F. Supp. 42, 43 (D.S.C. 1992). De novo review is not required by the statute when an objecting party makes only general or conclusory objections that do not direct the court to the specific error in the magistrate judge's recommendations. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Furthermore, the Statute does not require any review at all of issues that are not the issue of an objection. Thomas v. Arn, 474 U.S. 140, 149 (1985); Camby, 718 F.2d at 200; Eker v. Apfel, 152 F. Supp. 2d 863, 864 (W.D.N.C. 1998). Nonetheless, a district court judge is responsible for the final determination and outcome of the case, and, therefore, this Court has conducted a careful review of Magistrate Judge Horn's "Memorandum and Recommendation and Order," as well as a de novo review of those issues specifically in Plaintiffs' Objections.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Plaintiff has not made specific or general objections to the findings of fact and procedural background contained in Magistrate Judge Horn's "Memorandum and Recommendation and Order." After a review of the record in this case, the Court adopts the factual findings made by the Magistrate Judge on pages two through six of his opinion filed July 13, 2000.

III. DISCUSSION OF LAW

Applying the careful standard of review to those portions of the Magistrate Judge's recommendation that were not

specifically objected to, the Court finds that the Magistrate Judge's findings of fact are supported by the record and his conclusions of law are consistent with the current case law.

Plaintiffs' first objection, that Plaintiffs' claims are not barred by the Eleventh Amendment because Plaintiffs do not seek retroactive relief, is merely a general and conclusory objection that does not direct the Court to a specific objectionable aspect of the Magistrate Judge's recommendation, and, therefore, is only subject to careful review. Not with standing this Court's obligation to conduct a less-searching standard of review, this Court finds that the Magistrate Judge's conclusion that Plaintiffs are essentially seeking a retroactive damages award, regardless of how artfully they have characterized the relief requested by Medicaid recipients suing for a portion of the tobacco settlement. See, e.g., Floyd v. Thompson, 111 F. Supp. 2d 1097, 1100 (W.D. Wis. 1999); Cardenas v. Anzai, 128 F. Supp. 2d 704, 709 (D. Haw. 2001); Strawser v. Lawton, 126 F. Supp. 2d 994, 1003 (S.D.W.V. 2001), appeal docketed, No. 01-1175 (4th Cir. Feb. 9, 2001); Martin v. State of New Mexico, 197 F.R.D. 694, 696 (D.N.M. 2000) (stating that Plaintiffs' argument "is not well taken"); Downs v. Commonwealth of Kentucky, No. 00-23, *6-8 (E.D. Ky. Aug. 31, 2000), appeal docketed, No. 00-6282 (6th Cir. Sept. 27, 2000); Tyler v. Douglas, 2000 WL 1146575, *3 (D. Vt. June 21, 2000), appeal docketed, No. 00-7839 (2nd Cir. July 11, 2000); Barton v. Summers, 111 F. Supp. 2d 989, 992-93 (M.D. Tenn. 2000), appeal docketed, No. 00-5942 (6th Cir. July 19, 2000); but see Harris v. Owens, 2001 WL 103907, *6-7 (10th cir. 2001) (stating that the Court disagrees with those district courts holding otherwise, but affirming the district court's dismissal of the suit on the merits).

Plaintiffs' second objection regarding the applicability of cited case law simply reiterates their legal arguments, which were presented to, reviewed, and taken into consideration by the Magistrate Judge in making his recommendation. Upon

a careful review of those portions of the Magistrate's recommendation, this Court finds that his findings of fact are supported by the record and his conclusions of law are consistent with current case law. See, e.g., McClendon v. Georgia Dep't of Cmty. Health, 2001 WL 936051, *8 (11 Cir. 2001)((agreeing with the Floyd court's analysis of the merits in dismissing Plaintiff Medicaid recipients' lawsuit); Floyd, 111 F. Supp. at 1034-38 (affirming the District Court's dismissal of Plaintiff Medicaid recipients' lawsuit on the merits, rather than on Eleventh Amendment grounds); Clark v. Stovall, 2001 WL 395349, *19-21 (D. Kan. 2001) (relying on the analysis of Barton and Floyd in dismissing Plaintiff Medicaid recipients' lawsuit); Cardenas, 128 F. Supp. 2d at 709 (relying on Barton and Floyd in dismissing Plaintiff Medicaid recipients' lawsuit); Martin, 197 F.R.D. at 696-97 (relying on Barton and Floyd in dismissing Plaintiff Medicaid recipients' lawsuit on Eleventh Amendment grounds); Brown v. Minnesota, 617 N.W.2d 421, 428 (Minn. App. 2000), cert denied, 1655, 69 U.S.L.W. 3593, 69 U.S.L.W. 3683, 69 U.S.L.W. 3685, (U.S. April 23, 2001) No. 00-1339) (Affirming the District Court's order dismissing Plaintiff Medicaid recipients' lawsuit).

Additionally, Plaintiffs' third objection, that Magistrate Judge Horn was required to take as true Plaintiffs' assertion that the North Carolina tobacco litigation was a Medicaid recovery action, is a frivolous objection with no basis in law. It is true that a judge must take factual allegations as true for purposes of a motion to dismiss. See Gomer v. Philip Morris, Inc., 106 F. Supp. 2d 1262, 1268 (M.D. Ala. 2000) (citations omitted).

The Court must now consider the specific objections raised by Plaintiffs. As to all issues not specifically discussed below, this Court has conducted a careful review of all issues and adopts the recommendations of Magistrate Judge Horn.

A. Nature of the State Tobacco Settlements

Plaintiffs specifically object to Magistrate Judge Horn's conclusion that the amendment to 42 U.S.C. § 1396b(d)(3) indicates that the "state tobacco settlements were not to be considered an 'overpayment' under the Medicaid reimbursement statute.'" Civ. No. 5:00CV14V, Doc. No. 36, "Plaintiffs' Objections to Recommendation," July 21, 2000, at 7 (quoting Magistrate Judge Horn's Memorandum and Recommendation and claim to Medicaid reimbursement from the tobacco settlement funds to which it would otherwise have been entitled under 42 U.S.C. § 1396K." See id. In addition to the findings of fact and conclusions of law asserted by Magistrate Judge Horn, other courts have specifically rejected this same argument. Harris, 2001 WL 103297, at *9-12 (holding that funds received by states under the tobacco litigation settlement are not subject to the distribution requirements of § 1396k(b), which requires states to forward any overpayment under the reimbursement scheme to Medicaid recipients); Strawser, 126 F. Supp. 2d at 1000 (stating that "Plaintiffs' proposed interpretations . . . do not find support in the comparatively unembellished statutory language"). Additionally, all courts are in agreement that the amendment vests states with a "complete right, title, and interest in the settlement proceeds," Strawser, 126 F. Supp. 2d at 1000, and therefore, is not to be considered as an overpayment under the Medicaid reimbursement scheme. See Harris, 2001 WL 1032907, at *9-12; McClendon, 2001 WL 936051, at *7-8; Watson v. Texas, 2001 WL 883533, *HN 13-14 (no page references available); Floyd, 227 F.3d at 1034-38; Clark, 2001 WL 395349, at *6; Villagrana v. Graham, 2001 WL 670934, *2-3 (D. Utah 2001); Strawser, 126 F. Supp. 2d at 999-1002; Skillings v. Illinois, 121 F. Supp. 2d 1235, 1236-39 (C.D. Ill, 2000); Tyler, 2001 WL 1146575, at *1-2; Brown, 617 N.W. 2d at 425-27; State of California v. Bolduc, 83 Cal. App. 4th 597, 602-08 (Aug. 31, 2000) review denied (Cal. Nov. 15,

2000). Accordingly, this Court finds that Magistrate Judge Horn's findings of fact are supported by the record and his conclusions of law are consistent with current case law, and therefore, adopts the recommendations of the Magistrate Judge regarding the nature of the state tobacco settlements.

IV. ORDER

IT IS, THEREFORE, ORDERED that the "state Official Defendants' motion to Dismiss" be GRANTED.

IT IS FURTHER ORDERED that the Golden L.E.A.F., Inc.'s "Motion to Dismiss" be GRANTED.

IT IS FURTHER ORDERED that the Plaintiffs' case is hereby DISMISSED WITH PREJUDICE.

THIS the 21st day of September, 2001.

/s/_____
Richard L. Voorhees
United States District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Civil Action No. 5:00CV14-V

HILDA WHITE, *et al.*,

Plaintiffs,

v.

JAMES B. HUNT, JR., *et al.*,

Defendants.

Civil Action No. 5:00CV14-V

MEMORANDUM RECOMMENDATION AND ORDER

THIS MATTER is before the Court on three motions to dismiss: the "State-Official Defendants' Motion to Dismiss) (docket #6) and the Gold L.E.A.F., Inc. "Motion to Dismiss" (document #8), both filed March 13, 2000, and "Motion of Defendant Citibank, N.A. to Dismiss Complaint" filed June 2, 2000 (document #24). Memorandum in Support (documents #7, #9, and #24) were filed with each motion. "Plaintiff's Memorandum of Law In Opposition . . " was filed by the State-Official Defendants (document #27 and a "Reply to Plaintiff's Memorandum in Opposition to Citibank's Motion to Dismiss" (document #30) was filed.

Having carefully considered the arguments, the record, and the applicable authority, the undersigned will respectfully recommend that all three motions to dismiss be granted and that the Complaint be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, purporting to represent a class of Medicaid recipients, filed this action January 27, 2000 claiming a portion of the State of North Carolina's 1998 settlement with the major national tobacco companies. Each of the four courts which have considered similar claims to date (in Wisconsin, Minnesota, Tennessee, and Colorado, discussed infra) have found them to be without merit, as does the undersigned. Indeed, the state court in Minnesota found the claims sufficiently frivolous to support sanctions against Plaintiffs' counsel for asserting them, and U.S. District Judge Todd J. Campbell of the Middle District of Tennessee described the Plaintiff's position in that case as based on "exquisite sophistry."

In November 1998, the State of North Carolina joined 45 other states in entering a comprehensive "Master Settlement Agreement" ("MSA") with the nation's major national tobacco companies. In addition to agreeing to pay the states billions of dollars – continuing as long as tobacco products are sold in the United States – the MSA prohibited the tobacco companies from engaging in certain advertising, including advertising, including advertising directed at young people, and required states that had not yet filed suit against tobacco companies to do so and move for court approval of the MSA.

Upon entering the MSA, the State of North Carolina, through the Attorney General, filed the required suit, State v. Philip Morris, Inc., No. 98 CVS 14377, in the Superior Court of Wake County, North Carolina. The same date the lawsuit was filed the parties entered into a "Consent Decree and Final Judgment," which enjoined the prohibited advertising and provided for the creation of a nonprofit corporation to

receive and distribute fifty percent of the tobacco settlement funds. North Carolina's share of the payments from the tobacco companies over the next 25 years is projected to be about $4.6 billion.

In sharp contrast to Plaintiffs' simplistic attempt to construe the 1998 lawsuit and settlement as a Medicaid reimbursement action, the 1998 action also asserted and settled claims for unfair and deceptive trade practices, restraint of trade in violation of the antitrust laws, deceptive advertising, and unjust enrichment. Furthermore, to eliminate any possible doubt about whether the settlement was a Medicaid reimbursement action (and thus, subject to the kind of excess recovery claim asserted by the Plaintiffs), in May 1999, Congress specifically amended 42 U.S.C. § 1396b(d) to make it clear that the settlement funds under the MSA were not to be considered "overpayment" under the Medicaid laws.

According to the Consent Decree and Final Judgment, the nonprofit corporation was to use its designated "fifty percent of the funds . . . to provide economic impact assistance to economically affected or tobacco-dependent regions of North Carolina." The parties and the Wake County Superior Court recognized that all payments to this yet-to-be created nonprofit corporation were "at the direction and on behalf of the State of North Carolina." The Superior Court retained jurisdiction to implement and enforce the MSA and the Consent Decree.

On March 16, 1999, the North Carolina General Assembly complied, directing the Attorney General to created the required nonprofit corporation, Defendant THE GOLDEN L.E.A.F. (Long-term Economic Advancement Foundation), Inc. (L.E.A.F.). The intent of this legislation, as the Act itself specifically provided, was to allocate half of the funds it received for the benefit of tobacco producers and allotment holders and the other half "for the benefit of health."

In addition to naming North Carolina's Governor, Treasurer, and Secretary of Health Human Services, Plaintiffs name the Golden L.E.A.F. and "JOHN DOE, in his or its official capacity as Tobacco Escrow Agent for the State of North Carolina" as party defendants. As it turns out, "JOHN DOE" is Citibank, which was chosen to serve as escrow agent for all 46 states who entered the MSA.

Following the November 1998 settlement, on December 23, 1998, the settling states and some of the affected tobacco companies signed an Escrow Agreement in which Citibank agreed to receive and administer the subject funds. On the same date, this Escrow Agreement was approved by the Supreme Court for the County of New York, New York, which retained exclusive jurisdiction over its administration. See State of New York v. Philip Morris, No. 400361-97 (Order dated December 23, 1998). Citibank essentially argues that it is merely an "innocent third-party escrow agent," that it had nothing whatever to do with the terms of the MSA or any state-based decision concerning expenditure of the settlement proceeds, and that it agreed to serve as Escrow Agent on the specific condition that it would not be haled into the courts of the 46 states governed by the MSA.

II. CONCLUSIONS OF LAW

A. Standard of Review/Motions to Dismiss

"A motion to dismiss under [Fed. R. Civ. P. 12(b)(6)] tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1993), citing 5A C. Wright & A Miller, Fed. Practice and Procedure § 1356 (1990).

"A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of [the subject] claim."

McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 328 (4th Cir. 1996) (en banc), citing Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th cir. 1989); and Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969). Accord Republican Party of NC, 980 F.2d at 952 ("A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (internal citation omitted).

In considering a Rule 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff, assuming its factual allegations to be true. See, e.g., Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Mylan Labs, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993); Martin Marietta v. Int'l Tel. Satellite, 991 F.2d 94, 07 (4th Cir. 1992); and Revene v. Charles County Comm'rs., 882 F.2d 870, 872 (4th Cir. 1989).

B. Eleventh Amendment Immunity

Under the Eleventh Amendment, "an unconsenting state is immune from suits is immune from suits brought in federal courts by her own citizens as well as by citizens of other states." Edelman v. Jordan, 415 U.S. 651, 633 (1974); accord Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98 (1984); Cory v. White, 457 U.s. 85, 90-91 (1982). This immunity extends to State agencies and entities that are arms of a State. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Harter v. Vernon, 101 F.3d 334, 337 (4th Cir. 1996); Ristow v. South Carolina Ports Auth., 58 F.3d 1051, 1052 (4th Cir. 1995); Gray v. Laws, 51 F.3d 426, 430 (4th Cir. 1995).

The Eleventh Amendment "is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including Sovereign immunity." Seminole

Tribe, 517 U.S. at 54. Both the Supreme Court and the Fourth Circuit have noted the Amendment's dual purpose: preventing the judicial depletion of state funds and protecting the sovereign dignity of the states. See, e.g., Seminole Tribe, 517 U.S. at 54; Harter, 101 F.3d at 337; Gray, 51 F.3d at 431.

The Plaintiffs argue that an exception to Eleventh Amendment immunity first recognized in Ex Parte Young, 209 U.S. 123 (1908), applies in this case. Under this exception – which has been interpreted strictly rather than expansively by the supreme Court – the Eleventh Amendment does not bar injunctive relief requiring a State to comply with federal law in the future, even if compliance will require an ancillary expenditure of state funds. See, e.g., Pennhurst, 465 U.S. at 102; Papasan v. Allain, 478 U.s. 265, 277 (1986); and Green v. Mansour, 474 U.S. 64, 68 (1985).

As the first state and federal courts to consider it have concluded, however, the Ex Parte Young exception does not apply to Medicaid recipients suing for a portion of the tobacco settlement for two basic reasons. First, although not a named defendant, the State of North Carolina is the real party-in-interest in this action, all "sophistry" and rhetoric aside. And second, the Plaintiffs in this action are seeking far more than the "prospective" injunctive relief they allege: in fact, the Plaintiffs seek a very substantial share of the State's retroactive damages award. As the Defendants correctly urge, the fact that this retroactive damages award is to be paid in future installments is of no legal significance.

It is "well established that even though a State is not named as a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." Edelman, 415 U.S. at 663. The Supreme Court has held that ". . . when the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are [named as] nominal defendants."

Ford Motor Co. v. Dept of Treasury of the State of Indiana, 323 U.S. 459, 464 (1945) (emphasis added). "Thus, the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Halderman, 465 U.S. at 101 (internal quotations omitted), citing State of Hawaii v. Gordon, 373 U.S. 57, 58 (1963); accord Edelman, 415 U.S. at 663 ("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred Eleventh Amendment.")

Although Plaintiffs named only state officials as defendants, the State of North Carolina is the real party in interest in that Plaintiffs clearly seek money from state funds rather than from individuals sued in their "official capacity." Indeed, if granted, the relief implicates powers that only the State as whole, not the individual Defendants, can possibly exercise.

In this action, Plaintiffs seek to have this Court enter an order which: (1) seizes North Carolina's share of tobacco settlement funds; (2) places these funds in escrow until the putative class' claims are resolved; and (3) if it determines that the putative class has established their claim, requires North Carolina to pay the funds to the class represented by the Plaintiffs. The attempt to portray this as something less than an action against the State of North Carolina is unpersuasive, to put it nicely. To the contrary, if the requested relief is granted, it will clearly operate directly on North Carolina's treasury, and will have the direct effect of disbursing millions of dollars in state funds to the putative class.

Nor, as Plaintiffs also argue is this essentially an action for prospective "injunctive" or "declaratory" relief to which the Ex Parte Young exception properly applies. See, e.g., Edelman, 415 U.S. at 678 (in action by aid recipients, Young permits injunction requiring future compliance with federal law, although not an award of retroactive benefits); Quern v.

Jordan, 440 U.S. 332, 349 (1979) (Young permits prospective injunction requiring state to post notices for the benefit of those on public assistance); Milliken v. Bradley, 433 U.S. 267, 290 (1977) (in school desegregation case, Young allowed injunction requiring prospective remedial education programs, even though expenditure of state funds was required). But cf. Pennhurst, 465 U.S. at 103 (federal court but may not award retroactive monetary relief); Floyd v. Thompson, No. 99-C-0268-C (W.D. Wisc. Sept. 2, 1999) (finding almost identical arguments to constitute improper claim for retroactive monetary relief).

In short, because the Plaintiffs are essentially seeking a retroactive damages award from the State of North Carolina, their claims are barred by the Eleventh Amendment.

C. Failure to State Claims

Even if their claims were not barred by the Eleventh Amendment, the Plaintiffs have also failed to state a claim on which relief can be granted.

The Plaintiffs claims rest on a fundamentally false premise: namely, that the MSA settled a Medicaid reimbursement claim governed by 42 U.S.C. § 1396(k)(b). This premise is both factually and legally fallacious. First, as noted with particularity in Section I, the MSA was settlement by the State of a wide variety of state claims - - including tort liability claims sounding in quasi-criminal conduct. Accordingly, to characterize the 1998 negotiations and proceedings as a Medicaid reimbursement action borders on the frivolous. And second, to remove any doubt in May 1999 Congress amended the statute in question to make it clarion clear that the state tobacco settlements were not to be considered "overpayment" under the Medicaid reimbursement statute.

As has been noted, each of the five courts known to have considered similar or identical claims – on state court and three federal courts – has found the Plaintiffs' argument to

be without merit. See Tyler v. Douglas, No. 1.00CV39 (D.Vt.., June 21, 2000) dismissing Complaint for failure to state claims and on Eleventh Amendment grounds); Barton v. Summers, No. 3:00-0078 (M.D. Tenn., May 23, 2000) (dismissing Complaint for failure to state claims and on Eleventh Amendment grounds, characterizing Plaintiffs' position as based on "exquisite sophistry"); Harris v. Owens, Civil Action No. 99-S-953 (D. Colo. January 19, 2000) (recommendation of Magistrate Judge that claims be dismissed on Eleventh Amendment grounds); Floyd v. Thompson, 99-C-0268-C (W.D. Wis., Sept. 2 and 22, 1999) (dismissing Complaint for failure to state a claim and on Eleventh Amendments grounds); Brown v. Minnesota, File No. 98-11152 (Hennepin County, Minn. Dec. 15, 1998) (dismissing Complaint for failure to state a claim, finding claims sufficiently frivolous to support sanctions against plaintiff's counsel).

The undersigned is in accord with what our sister courts have concluded. In addition, as the Defendants have argued in their various pleadings in support of their motions to dismiss, there are a myriad of additional reasons why the Plaintiffs' claims must fail in this action. Among them: (1) Medicaid recipients in North Carolina do not assign all their rights to the State; (2) North Carolina's settlement with the tobacco companies did not release any individual's arguable claim against the same companies; (3) the amount of future payments and/or future Medicaid expenses are indeterminable; (4) to the extent they deal with future claims, as Plaintiffs unpersuasively insist, their claims are not yet ripe and/or the Plaintiffs lack standing to assert them; and (5) the joinder of the Escrow Agent for the entire MSA governing settlements with 46 states was improper for all the reasons argued in the "Brief In Support Of Citibank, N.A.'s Motion to Dismiss Complaint" filed June 2, 2000 (document #25).

III. RECOMMENDATION

For the foregoing reasons, the undersigned respectfully recommends that the subject motions to dismiss (docket #6, #8 and #24) be granted; and that the Complaint be dismissed with prejudice.

IV. NOTICE OF APPEAL RIGHTS

The parties are hereby advised, pursuant to 28 U.S.C. § 636(b)(1)(c), that written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within ten (10) days after service of same. Snyder v. Ridenour, 889 F.2d 1363, 1365(4th Cir. 1989); United States v. Rice, 741 F. Supp. 101, 102 (W.D.N.C. 1990). Failure to file objections to this Memorandum with the district court constitutes a waiver of the right to de novo review by the district court, Snyder, 889 F.2d at 1365, and may preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 93-94 (4th Cir.), cert. denied, 467 U.S. 1208 (1984).

V. ORDER

NOW THEREFORE, all discovery and further proceedings in this action are hereby STAYED, pending final resolution of these motions the Honorable Richard L. Voorhees. If Judge Voorhees agrees with the undersigned and allows the case to go forward, then any defendant remaining in the case shall file an Answer, conduct an Initial Attorneys Conference, and otherwise comply with the Federal Rules of Civil Procedure and the Local Rules of this Court in all their particulars.

The Clerk is directed to send copies of this Memorandum and Recommendation and Order to counsel for the parties, and to the Honorable Richard L. Voorhees.

SO ORDERED AND RECOMMENDED, this 12th day of July, 2000.

/s/_____

Carl Horn
Chief U.S. Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No. 6:00-324-24

STEPHEN ALBERT JOSEPH, JR.; SELMA CHARLENE HATFIELD; HOWARD S. MILLER; ANNIE SAMS MOSTELLER; DEBORAH KAY MULLINS; MAMIE BREWER, PERSONAL REPRESENTATIVE OF THE ESTATE OF CALVIN BREWER; BRENDA CARSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF BONDALE CARSON MILER; MARGARET RENEE FLEMING, PERSONAL REPRESENTATIVE OF THE ESTATE OF ERNESTINE FLEMING; LAURA KELLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH MCABEE; ALFORD WELBORNE, INDIVIDUALLY AND ON BEHALF OF THE OTHERS SIMILARLY SITUATED;

Plaintiffs,

v.

CHARLES M. CONDON, ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; SAM GRISWOLD, DIRECTOR, DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF HEALTH AND HUMAN SERVICES; CITIBANK, N.A., IN ITS OFFICIAL CAPACITY AS ESCROW AGENT,

Defendants.

ORDER

This action arises out of a case brought in state court by the State of South Carolina against numerous tobacco companies. See State of South Carolina v. Brown &

Williamson Corp., C/A 97-CP-40-1686. In that case, South Carolina based its allegations upon its contention that:

> [i]n the name of profits, the tobacco industry has chosen to ignore and suppress the truth about the health hazards of cigarette smoking and of being exposed to cigarette smoke. As a result, Medicaid and other publicly-funded health care recipients in the State of South Carolina have contracted smoking-related diseases, including, without limitation, cancer, emphysema and heart disease. The care of these Medicaid and other publicly–funded health care recipients has placed a significant burden on the State of South Carolina. This burden should rightly be borne by the tobacco industry. Therefore, the State of South Carolina has filed this lawsuit to force the tobacco industry to pay for the health care crisis its cigarettes have caused .... [the action is brought] pursuant to [South Carolina] constitutional, statutory, common law, legal and/or equitable authority for the purposes of, *inter alia*, obtaining reimbursement for all monies paid by the State of South Carolina for medical assistance to Medicaid and other publicly-funded health care recipients who suffer, who have suffered, from tobacco-related disease as a result of the actions of Defendants, for statutory penalties, as well as such other relief as will afford a full and complete remedy.

Amended Complaint dated August 1, 1997, ¶¶ 1-2.

The state court case was settled pursuant to South Carolina's participation in a nationwide Master Settlement Agreement (MSA) and subsequent Consent Decree and Final Judgment entered December 31, 1998. The MSA provided that the participating tobacco companies would agree to permanent relief in the form of, among other things, a prohibition against advertisements targeting youth smoking, a ban on use of cartons to package tobacco products, a

limitation in sponsorships, and the elimination of outdoor advertising. In addition, the tobacco companies agreed to establish a national foundation to support the study of and programs to reduce the use of tobacco products by youth, as well as the study of and programs to prevent diseases associated with the use of tobacco. The participating tobacco companies also agreed to fund annually an escrow account to be allocated among the participating states pursuant to the terms of an Escrow Agreement. Funds in the escrow account are to be disbursed periodically. In South Carolina, the payments are deposited into the General Fund. South Carolina stands to receive cash payments in an amount in excess of $2.3 billion over the next 25 years.

In exchange for the concessions made by the tobacco companies under the MSA, the participating states, including South Carolina released:

> (1) for past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omission, those Claims directly or indirectly based on, arising out of or in any way related, in whole or part, to (a) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (b) the exposure to, or (c) research, statements, or warnings regarding, Tobacco Products . . .
>
> (2) for future conduct, acts or omissions, only those monetary claims, directly or indirectly based on, arising out of or in any way related to, in whole or in part the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with use of or exposure to Tobacco Products.

MSA, pp. 13-14.

Plaintiffs comprise a proposed class of persons who suffer from various diseases that they assert result from smoking cigarettes. Plaintiffs receive assistance through the South Carolina Medicaid program, S.C. Code Ann. §§ 43-7-50 to – 460, for payment of treatment they required result of their smoking-related illnesses. The South Carolina Medicaid program receives federal funds under the Medicaid Act, 42 U.S.C. §§ 1396 to 1396v ("the act"). As a condition of receiving such funds for the Medicaid program, South Carolina must comply with the terms and provisions of the Act and applicable federal regulations. See 42 U.S.C. § 1396a.

Pertinent to the within action, the Act requires those states that participate in the Medicaid program "to take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the plan[.]" Id. § 1396a(a)(25)(A). In any case "where legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State ... will seek reimbursement for such assistance to the extent of such legal liability." Id. § 1396a(a)(25)(B). When the State collects funds from a third party as reimbursement for Medicaid benefits expended on a recipient, the funds received are utilized to reimburse the State and federal governments for medical assistance payments made on behalf of an individual. Id. § 1396k(b); 42 C.F.R. § 433.154. The state plan must provide that the requirements for distributing third party collections are met. 42 C.F.R. § 433.151. If a state fails to comply with the third-party recovery provisions of the Act, it can lose its entitlement to federal Medicaid funds. See 42 C.F.R. § 433.140(a)(1). Under South Carolina law, a person who receives Medicaid benefits is deemed to have made an automatic assignment to the state of his right to seek

reimbursement from a third party. S.C. Code Ann. § 43-7-420; see 42U.S.C. § 1396(a)(1)(A).

The federal government may reduce its payments to states under the Act "to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party pursuant to the provisions of its plan in compliance with section 1396(a)(25)[.]" 42 U.S.C. § 1396b(d)(2)(B). In May 1999, Congress amended the Act to provide that the federal government would waive its right to reduce payments to the states because of "any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products ... and State Attorneys General[.]" Id. § 139b(3)(B)(i). Significantly, Congress also provided that, "[e]xcept as provided in subsection (i)(19) [providing for amounts expended on administrative costs to initiate or pursue the tobacco litigation], a State may use amounts recovered or paid to the state as part of a comprehensive or individual settlement, or a judgment, . . . for any expenditures determined appropriate by the state." Id. § 1396b(d)(3)(B)(ii).

The gravamen of Plaintiff's complaint is that the underlying purpose of the state court case was to seek reimbursement for Medicaid expenses incurred by the State of South Carolina in caring for Medicaid recipients with smoking-related health problems. Plaintiffs contend that the parties to the MSA "took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though the Complaint filed by South Carolina explicitly sought to recover medical expenditures[.]" Amended Complaint, ¶ 54. According to Plaintiffs, the MSA was crafted in this manner so that the participating states could avoid their recovery obligations under the Act. Id., ¶¶ 55, 60. Plaintiffs assert that they have waived no rights under the Act, so that any excess recovery belongs to them and must

be disbursed to them in accordance with 42 U.S.C. § 1396k(b). Id., ¶ 60.

Plaintiffs bring this action pursuant to 28 U.S.C. § 2201, seeking a declaration of their rights and Defendants' obligations (1) "with respect to the integrity of the South Carolina Medicaid program insofar as Defendants' failure to comply with federal law imperils its continued receipt of federal funds and endangers the public assistance program upon which Plaintiffs rely to maintain their health and well-being'; and (2) "with respect to the provisions of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and with respect to the proper disbursement of amounts recovered." Id., ¶¶ 65-66. Plaintiffs also bring this action pursuant to 42 U.S.C. § 1983, asserting that Defendants have (1) deprived them of their property without just compensation in violation of the Fifth and Fourteenth Amendments; and (3) violated the disbursement and recovery requirements of the Act. Plaintiffs seek an order certifying the class and granting declarative and injunctive relief, as well as costs and reasonable attorneys' fees.

This matter is before the court on motion of Defendants Charles M. Condon and Sam Griswold (the "State Defendants") pursuant to Rules 12(b)(1) and (b)(6), FRCP, to dismiss the amended complaint filed on April 25, 2000. Plaintiff filed a memorandum in opposition to the State Defendants' motion to dismiss on May 10m 2000. Also before the court is a motion pursuant to Rules 12(b)(1), (b)(6), and (b)(7), FCRP, to dismiss filed by Defendant Citibank, N.A. ("Citibank") on June 8, 2000. Plaintiffs filed a memorandum in opposition to Citibank's motion to dismiss on June 23, 200. Citibank filed a reply brief a reply on July 18, 2000.

A hearing was held on the motions on August 21, 2000. The State Defendants thereafter filed a number of cases in support of their position. Plaintiffs filed a supplemental

memorandum in opposition to the State Defendants' motion to dismiss on November 21, 2000. The State Defendants filed a reply to Plaintiffs' supplemental memorandum on December 4, 2000. Citibank also filed additional authority in support of its motion to dismiss on January 25, 2001.

The court has reviewed the pleadings, memoranda, exhibits, and other documents of record. The court concludes that the motions to dismiss should be granted.

DISCUSSION

A. Section 1983 Claims

1. Motion to Dismiss of State Defendants

The State Defendants assert numerous grounds upon which the complaint should be dismissed. The threshold issue, however, is the State Defendants' contention pursuant to Rule 12(b)(1) that the court lacks subject matter jurisdiction because Plaintiffs' claims are barred under the Eleventh Amendment and the doctrine of sovereign immunity.

A plaintiff has the burden of proving that subject matter jurisdiction exists. See Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceedings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Id. The court should grant the Rule 12(b)(1) motion to dismiss only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Id.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Eleventh Amendment has been construed as preventing a federal court from entertaining a suit brought by a citizen against his own state. Hans v. Louisiana, 134 U.S. 1 (1980). The purpose of the Eleventh Amendment is to prevent federal court judgments that must be paid out of a state's treasury and to avoid "the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." Kess v. Maryland, 2001 WL 85179, at &1 (D. Md. Jan. 29, 2001) (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996)). The doctrine applies both to recovery of damages and to injunctive relief. Cory v. White, 457 U.S. 85 (1982).

Courts have recognized exceptions to Eleventh Amendment immunity (1) where the state has consented to suit; (2) where Congress has abrogated the state's immunity; and (3) where the application of Ex parte Young, 209 U.S. 123 (1908), and its progeny is appropriate. Barton v. Summers, 111 F. Supp. 2d 989, 990-91 (M.D. Tenn. 2000) (citing Nelson v. Miller, 170 F.3d 641, 646 (6th Cir. 1999)). It is upon the Ex parte Young exception that Plaintiffs rely to refute the State Defendants' claim that the Eleventh Amendment bars this action.

Ex parte Young provides that a plaintiff may seek prospective injunctive relief against a state official in order to compel a state to conform its conduct to federal statutes or the Constitution, even if the change in conduct would have an ancillary effect on the state treasury. Cardenas v. Anzai, 2001 WL 58857, at *2 (D. Hawaii Jan. 18, 2001) (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974)). In other words, the Eleventh Amendment does not preclude suit against state officials for "'prospective relief for an ongoing

violation of federal law.'" Id. (quoting Children's Hospital & Health Ctr. v. Belshe, 188 F.3d 1090, 1095 (9th Cir. 1999)). However, the Eleventh Amendment does bar actions against state officials "when the action is in essence one for recovery of money from the state, [because then] the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are [named as] nominal defendants." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). This is because damages for past harm inevitably will be paid out of the state treasury. Edelman v. Jordan, 415 U.S. 651, 666-67 (1974). In sum, the Ex parte Young exception would allow Plaintiffs to maintain this action against the State Defendants if "[1] there is an ongoing violation of federal law that [2] can be cured by prospective relief." DeBauche v. Trani, 191 F.3d 499, 505 (4th Cir. 1999). The Ex parte Young exception does not apply when the alleged violation of federal law occurred entirely in the past. Id.

The first question, then, is whether there exists an "ongoing violation of federal law." According to Plaintiffs, the State Defendants have failed and continue to fail to comply with the provisions of § 1396k(b) of the Act with respect to funds disbursed to South Carolina under the terms of the MSA. As noted previously, § 1396k(b) requires amounts collected from third parties in excess of any amount retained by the State to be paid to the federal government to the extent of its participation in the financing of the medical assistance, and the remainder to the recipient of the assistance. Thus, Plaintiffs contend that they are entitled to a portion of the MSA disbursement.

Plaintiff's contention neglects to consider the import of § 1396b(d)(3)(B)(ii), which grants states the authority to utilize payments made pursuant to the MSA "for any expenditures determined appropriate by the state." The court in Strawser v. Lawton, 126 F. Supp. 2d 993, 999 (S.D.W. Va. 2001), found that with the enactment of §

1396b(d)(3)(B)(ii) Congress "changed the statutory scheme where tobacco settlement funds are involved." Relying upon established principles of statutory construction, the Strawser court determined that § 1396b(d)(3)(B)(ii) "is an unambiguous Congressional mandate vesting in the participating states a complete right, title, and interest to the settlement proceeds, excepting only litigation expenses. Hence, there is no ongoing violation of federal law, and Ex parte Young is inapplicable." Id. at 1000. The court finds the reasoning of the Strawser court to be persuasive and adopts it herein. The court finds that no ongoing violation of federal law exists because Congress has relieved states of their obligations under § 1396k(b) with respect to funds received under the MSA. Accord Clark v. Stovall, C/A No. 00-4054 (D. Kan. March 2, 2001) (citing cases); Tyler v. Douglas, 2000 WL 1146575 (D. Ver. June 21, 2000) (no violation of federal law arises from Vermont's participation in MSA). Thus, the Ex parte Young exception does not remove the Eleventh Amendment bar to the within action. The State Defendants' motion to dismiss is granted on this ground.

Even if the court were to find that the State Defendants' failure to comply with the provisions of § 1396k(b) of the Act did constitute an ongoing violation of federal law, Plaintiffs cannot prevail on the second prong of the analysis, which requires that the relief they seek be prospective in nature. Plaintiffs argue that they "seek only a declaration that state officials are violating federal law and an injunction requiring their future compliance with that law." Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 6. According to Plaintiffs, they do not lay claim to disbursements previously made to South Carolina pursuant to the MSA. Rather, they "seek a declaration that monies yet uncollected but due to be paid to South Carolina in the future must be distributed in accordance with federal law." Id., p. 7.

Other courts have addressed and rejected similar arguments with respect to disbursements under the MSA, and have found that such relief as that pursued by Plaintiffs is retrospective. In Floyd v. Thompson, 227 F.3d 1029, 1101 (7th Cir. 2000), aff'd on other grounds, 227 F.3d 1029 (7th Cir. 2000), the court explained:

> Plaintiffs argue that the relief they seek is prospective in the sense that a designated portion of *future* settlement proceeds would be paid to plaintiffs, rather than to the state treasury .... It is wholly irrelevant that payments will be made in fixed future installments rather than a lump sum. Allowing plaintiffs to recover a portion of the settlement funds would be the functional equivalent of retrospective monetary damages paid from the state treasury because the amount, obligation and ownership of the funds was fixed when the Master Settlement Agreement was signed, rather than upon receipt of the funds. Therefore, even if the proceeds are paid in installments, the Eleventh Amendment bars plaintiffs from gaining access to the funds through suit in federal court.

Accord Clark, C/A/ No. 00-4054-SAC, at 19 ("the payments are being made in settlement of past claims, the mode of payments is in installments as opposed to a lump sum settlement, the amount of installment payments is computed from terms fixed by the M.SA, and the states have a 'vested right' or 'equitable title' to the escrowed funds"); Rickerts v. Guinn, C/A No. CV-N-00-0176-HDM(VPC) (D.Nev. Feb. 23, 20001), at 5 (irrelevant that funds are not yet in the physical possession of the state); Cardenas, 2001 WL 58857, at *4 ("to enjoin State officials would be tantamount to telling the state how to disburse funds" to which it has a present entitlement under the MSA); Barton, 111 F. Supp. 2d at 991 (future installment method of payment created by MSA does not convert plaintiff's claim into one for

prospective injunctive relief); Martin v. New Mexico, 197 F.R.D. 694, 696 (D.N.M. 2000) (the MSA "fixed the rights of the parties, the states and the tobacco companies, at the time the settlement was made, and it is irrelevant that the money has not yet been deposited in the state treasury"); Downs v. Kentucky, C/A No. 00-23 (E.D. Ky. Aug. 31, 2000) (the MSA "created a defined obligation for payment. The parties have settled their dispute and the Commonwealth has a legal right to recover the money provided for by the [MSA]. A fixed an ascertainable right to Settlement funds has been established."); McClendon v. Georgia Dep't of Community Health, C/A No. 4:000-CV-0026-HLM (N.D. Ga. Aug. 28, 2000), at 17 ("The difference between a lump sum payment at the time of a settlement and future payments is one of accounting, not immunity from suit.")

Plaintiffs contend, however, that CSX Transp., Inc. v. Board of Pub. Works, 138 F.3d 537 (4th Cir. 1998), compels a different result. In that case, the Court of Appeals enjoined the state from collecting a tax that violated the Railroad Revitalization and Regulatory Reform Act of 1976. The Court of Appeals distinguished between funds that already had been deposited into the state treasury and funds that had not yet been collected from what it determined to be an illegal tax. The court determined that the Ex parte Young exception prevented application of the Eleventh Amendment bar, even though the amount of tax liability had been determined by the state. According to the Court of Appeals, the relief sought was prospective because "no award of any money need be made from the state treasury .... [Money] which state officials would otherwise collect from the Railroads, in violation of federal law, will be protected from collection." CSX, 138 F.2d at 542.

Plaintiffs' reliance on CSX is misplaced. The plaintiffs in CSX sought to prohibit the State's future procurement of illegal taxes and the placement of those funds into the state treasury. In the within action, South Carolina has a vested

right to receive proceeds under the SMSA in settlement of the claims articulated in the state court case. The entitlement to the proceeds was established at the time the MSA was executed. However, the parties to the MSA have agreed that the settlement may be paid out over time rather than in a lump sum. "That these damage payments are to be made in future installments does not alter the essential nature of these payments as retroactive monetary relief." Barton, 111 F.Supp. 2d at 992 (citing Papasan v. Allain, 478 U.S. 265, 278 (1986)).

The relief sought by Plaintiffs is retrospective, rather than prospective, in nature. For this additional reason, the Ex parte Young exception does not remove the Eleventh Amendment bar to this action. The court finds that, since this action is one for recovery of money from the state, South Carolina is the real party in interest, and the State Defendants are entitled to assert the Eleventh Amendment. The court concludes that Plaintiffs' § 1983 claims against the State Defendants are barred by the Eleventh Amendment.

2. Motion to Dismiss of Citibank

Citibank moves to dismiss pursuant to Rule 12(b)(6), asserting that Plaintiffs have failed to state a claim against it. Rule 12(b)(6) requires that the court accept the allegations in the complaint as true, and all reasonable factual inferences must be drawn in favor of the party opposing the motion. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). Therefore, a motion to dismiss can be granted only if no relief could be obtained under the allegations of fact, if true. Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 891 (D. Del. 1991) (citing Turbe v. Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991)). According, the court turns to Plaintiffs' § 1983 claims as they related to Citibank.

Plaintiffs allege that Citibank has deprived them of MSA proceeds in violation of their property rights under the Fifth and Fourteenth Amendments, as well as the disbursement requirements of the Act. Claims under § 1983 arise when

the state acts "under color of any statute, ordinance, regulation, custom, or usage, of any State" to deprive a person of the "rights, privileges or immunities secured by the Constitution and laws" of the United States. Significantly, § 1983 requires the identification of conduct that is "fairly attributable to the state." DeBauche v. Trani, 191 F.3d 499, 506 (4th Cir. 1999) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). The person charged either must be a state actor or have a sufficiently close relationship with state actors such that a court would conclude the nonstate actor is engaged in the state's actions. Id. (citing cases).

Citibank is a private corporation whose involvement with the MSA is through its activities as escrow agent. Private activity generally will not be deemed "state action" unless the state has so dominated such activity as to convert it into state action. Mere approval of or acquiescence in the initiatives of a private party is insufficient. Id. at 507 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). The Court of Appeals for the Fourth Circuit has recognized four circumstances under which a private party can be deemed to be a state actor: (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a state actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional action in the course of enforcing a right of a private citizen. Id. (citing Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993)).

None of four these categories appertains here. The relationship between Citibank and the State of South Carolina is purely contractual. The mere existence of a contract between a private party and South Carolina is insufficient to create state action unless the contract delegates a public function to the private party. Dobyns v.

E-Systems, Inc., 667 F.2d 1219, 1227 (5th Cir. 1982). In this case, the Escrow Agreement requires Citibank to make disbursements of funds received pursuant to the MSA in accordance with the terms of the Escrow Agreement. Citibank makes no decisions regarding the use of MSA monies by South Carolina. Those decisions are made by State officials. The court discerns no requirement in the Escrow Agreement that Citibank perform a state function. Accordingly, the court concludes that Citibank is not a state actor for purposes of Plaintiffs' § 1983 claims.

Moreover, as discussed previously, no violation of federal law is apparent because Congress has relieved states participating in the MSA of any obligation to disburse funds to Medicaid recipients pursuant to § 1396k(b) of the Act. Because Plaintiffs have been deprived of no right or privilege secured by the Act, § 1983 is not implicated in the within section.

B. Declaratory Judgment

Plaintiffs' claim for declaratory relief is barred by the Eleventh Amendment as against the State Defendants. Green v. Mansour, 474 U.S. 64, 73 (1985). "[A] declaratory judgment is not available when the result would be a partial 'end run' around the rest of the Supreme Court's Eleventh Amendment jurisprudence, particularly its limitations on the Ex parte Young doctrine." Castro v. Puerto Rico, 43 F. Supp. 2d 186, 192 (D.P.R. 1999) (quoting Mills v. Maine, 118 F.3d 37, 55 (1997)).

Citibank's obligations to disburse funds to Plaintiffs would come into play only if it were found that the State Defendants had violated the Act. Because the State Defendants are entitled to Eleventh Amendment immunity on this issue, declaratory relief with respect to Citibank is inappropriate. See Strawser, 126 F. Supp. 2d at 1001.

II. CONCLUSION

For the reasons stated, Defendants' motions to dismiss are granted.

IT IS SO ORDERED.

/s/_____
Margaret B. Seymour
United States District Judge

March 19, 2001

Spartanburg, South Carolina.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

Civil Action No. 2:00-0073

LOIS STRAWSER, *et al.*

v.

ELIZABETH S. LAWTON, *et al.*

MEMORANDUM OPINION AND ORDER

Pending are (1) separate motions to dismiss filed by Defendants (a) Elizabeth S. Lawton, Darrell W. Peters, and Joan E. Ohl, (b) Darrell McGraw, and (c) Citibank N.A.; (2) Plaintiffs' motion for oral argument; and (3) Defendants' motions to stay discovery pending disposition of their dispositive motions.

The Court **GRANTS** the motions to dismiss, **DENIES** the motions to stay as moot, and **DENIES** Plaintiffs' motion for oral argument.[1]

I. FACTUAL BACKGROUND

In 1994, West Virginia Attorney General Darrell V. McGraw, Jr., on behalf of his statutory clients at the West Virginia Public Employees Insurance Agency (PEIA) and

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[1] The facts and legal theories are adequately briefed and oral argument would not materially aid the decisional process.

the West Virginia Department of Health and Human Resources (DHHR), instituted an action against the major tobacco companies and other Defendants in the Circuit Court of Kanawha County. The complaint stated claims for (1) unjust enrichment and restitution, (2) indemnity, (3) public nuisance, (4) fraud and approximately ten (10) other claims. The relief sought was broad, including compensatory and punitive damages, an injunction prohibiting the promotion of tobacco products to minors, and disgorgement of profits from the sale of cigarettes in West Virginia.

In November 1998, the tobacco companies and all but four states entered into a Master Settlement Agreement (M.S.A.) valued at an immense $200 billion dollars. The M.S.A., in part, compensates the states for past and future medical expenses occasioned by state underwritten treatment of tobacco-related illnesses. Payments under the M.S.A. will be made to the states over two and one-half decades. The M.S.A. does not resolve and release claims for "private or individual relief for separate and distinct injuries ... or ... recovery of health-care expenses" by individuals. (M.S.A. at II (pp)(2)(A) & (B).)

Over the last two years, West Virginia has received approximately $40 million dollars under the M.S.A. The money is transferred by the settling tobacco companies to an escrow agent, Citibank. Citibank then transfers a proportionate share of the monies to the State of West Virginia.

The West Virginia Legislature acted with dispatch to assert its sovereign control over the West Virginia portion. See W.Va.Code § 4-11A-1(c) et seq. ("The receipt of funds in accordance with the master settlement agreement shall be deposited only in accordance with the provisions of this article.") By this enactment, the Legislature exercised

control over the earmarking and disbursement of the settlement proceeds.[2]

Plaintiffs are Medicaid recipients who were harmed by tobacco products. Despite section 4-11A-1(c) *et seq.*, they seek an Order from this Court prescribing how West Virginia's nearly $2 billion share of the M.S.A. fund should be allocated, partially to their benefit.

II. DISCUSSION

A. Medicaid Program Background

The Medicaid program was established in 1965 as "a cooperative federal-state" venture providing monies for medical care to needy individuals. See Prestera Ctr. for Mental Health Servs. v. Lawton, 111 F.Supp.2d 768, 773 (S.D.W.Va. 2000) (quoting Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990)). One commentator describes the system aptly, asserting it:

> cast[s] state officials in the role of middlemen entrusted with the distribution of combined federal-state largesse to eligible beneficiaries. A state is under no legal obligation to utilize federal funds to meet the needs of its disadvantaged citizens. If it chooses to avail itself of such funds, however, it must expend them in a manner consistent with the federal statutes and regulations governing their use.

Leonard Weiser-Varon, Note, Injunctive Relief from State Violations of Federal Funding Conditions, 82 Colum. L.Rev. 1236, 1237-38 (1982).

When a state violates any condition governing the use of federal funds, the responsible federal official must terminate the funding to the state program, after providing notice and an opportunity to be heard. 42 U.S.C. § 1396c. The applicable conditions most often appear in a state plan, a

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[2] The very enactment of the statute poses a grave problem for Plaintiffs in circumnavigating the Eleventh Amendment.

comprehensive document Congress has directed each participating state to file. One such plan condition states:

> A State plan for medical assistance must--.... (25) provide--(A) that the state ... administering such plan will take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services available under the plan ... [and] (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the state can reasonably expect to recover exceeds the costs of such recovery, the state ... will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25). Subsection 1396a(a)(45) provides further:

> A State plan for medical assistance must--.... (45) provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients, in accordance with section 1396k of this title.

Id. Title 42 U.S.C. section 1396k(b), the statute upon which Plaintiffs principally rely, discusses the disbursement of monies recovered by states from liable third parties:

> Such part of any amount collected by the state under an assignment made under the provisions of this section shall be retained by the state as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C. § 1396k(b) (emphasis added).

Plaintiffs' claims are straightforward. They assert (1) the tobacco companies are third parties liable to Medicaid recipients injured by cigarettes; (2) the recipients assigned their claims to the state; (3) the state's suit against the tobacco companies was a Medicaid reimbursement action pursuant to subsection 1396k(b); (4) there is a "remainder" from the settlement with the tobacco companies under subsection 1396k(b); and (5) West Virginia has a mandatory obligation to pay over the remainder to Medicaid recipients injured by tobacco products. The State Defendants' principal argument for dismissal is that Plaintiffs' requested relief would amount to a retroactive award of damages against the State in violation of the Eleventh Amendment.

B. Eleventh Amendment Immunity From Suit

"Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the states as sovereign entities.'" Alden v. Maine, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 71 n. 15, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)). Upon ratification of the Constitution, the states thus enjoyed " 'a residuary and inviolable sovereignty.'" Alden, 527 U.S. at 715, 119 S.Ct. 2240 (quoting The Federalist No. 39, at 245 (James Madison)).

This understanding of the states' role in the early years of the Republic perhaps explains the Nation's "profound shock" following the Supreme Court's 1793 decision in Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (1793). Chisholm held that Article III of the Constitution authorized a private citizen of another State to sue the State of Georgia without its consent. Congress and the states responded swiftly with the Eleventh Amendment.

The Amendment provides in pertinent part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State." Id. Despite its text, the Amendment has been construed also to prevent citizens from bringing federal claims in a federal court against their own states. See Hans v. Louisiana, 134 U.S. 1, 14-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

The Amendment is much more than a constitutional prohibition to prevent a drawdown of a state fisc via federal litigation. Our Court of Appeals recently observed that "Inherent in [our] federal structure is the mutual, reciprocating respect for the state and federal sovereigns, and forcing one sovereign to appear against its will in the courts of another violates this respect." Litman v. George Mason University, 186 F.3d 544, 549 (4th Cir.1999) (emphasis added) (noting the Amendment serves not only the purpose of avoiding raids on the state treasury, but also " 'the indignity of subjecting a State to the coercive process of [federal] judicial tribunals at the instance of private parties.'") (quoted authority omitted).

There are certain limited situations, however, where the Amendment does not apply. For example, the Ex parte Young doctrine permits a private citizen to sue state officers in federal court "to ensure that the officer's conduct is in compliance with federal law." Seminole Tribe, 517 U.S. at 71 n. 14, 116 S.Ct. 1114. In DeBauche v. Trani, 191 F.3d 499, 505 (4th Cir.1999), however, our Court of Appeals restated the obvious corollary to this doctrine:

> The ... exception ... applies only when [1] there is an ongoing violation of federal law that [2] can be cured by prospective relief. It does not apply when the alleged violation of federal law occurred entirely in the past. See Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (observing that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment"); Republic of Paraguay v. Allen, 134

> F.3d 622, 627 (4th Cir.1998) (noting that the Ex parte Young exception applies only when "(1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective" (citations omitted)).

Id. (emphasis added).

Plaintiffs attempt to invoke Ex Parte Young to avoid the Eleventh Amendment. Both parties' arguments, however, revolve around whether the relief sought by Plaintiffs is prospective or retrospective in nature.

Although all federal courts to date addressing that question in Medicaid recipient actions for recovery of tobacco settlement money have ruled in favor of state officers, the analysis is complex and somewhat enigmatic. See Floyd v. Thompson, 227 F.3d 1029, 1031 (7th Cir. 2000) ("While we think it possible that the district court's Eleventh Amendment analysis was correct, the answer is not obvious, and we find it unnecessary to delve into the complexities of that area of law."). The instant briefing ignores the more direct, first prong of the Ex parte Young analysis, namely whether there is an ongoing violation of federal law.

The putatively violated federal law Plaintiffs rely upon is 42 U.S.C. § 1396k. Section 1396k(b) provides pertinently that any remainder from State collection efforts against liable third parties, after appropriate reimbursement of the Federal Government, "shall be paid to" affected recipients. Congress, however, has changed the statutory scheme where tobacco settlement funds are involved.

In Title III of the 1999 Emergency Supplemental Appropriations Act, ch. 11, 113 Stat. 57 (1999) (codified as amended at 42 U.S.C. § 1396b(d)(3)(B)(i) and (ii)), Congress addressed the National Governors Association's "highest priority" for the pending session, namely "protecting state tobacco settlement funds .... from federal seizure." Pls.' ex. 12 at 1. The new statute provides:

> (i) Subparagraph (A) [dealing with the federal pro rata share of net recoveries by a state plan to which the United States is equitably entitled] and paragraph (2)(B) [dealing with treatment of reimbursements by liable third parties to the state for injured recipient expenditures] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products ... and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19) [providing for state payment of litigation costs and expenses of pursuing the tobacco litigation], a State may use amounts recovered or paid to the state as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the state.

42 U.S.C. § 1396b(d)(3)(B)(i) and (ii) (emphasis added).

Plaintiffs assert this amendment "pertains only to whether [the Healthcare Finance Administration] may treat tobacco settlement payments as an overpayment to the states for the purpose of offsetting future federal Medicaid matching funds."[3] (Mem. in Opp'n at 20.) Plaintiffs also construe the

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[3] Plaintiffs also assert the only purpose of the underscored language in subsection (ii) was to "distinguish the Bill from competing legislation that would have required the states to use 'a portion of such funds for tobacco use prevention and health care and early learning programs." Mem. in Opp'n at 21 (citing 145 Cong. Rec. S2503). Plaintiffs' citation does not lead ineluctably to that conclusion.

language to mean "the states are free to spend their legal portion of the tobacco settlement on whatever they see fit." (Id. at 21) (emphasis added).

Plaintiffs' proposed interpretations of subsection (ii) do not find support in the comparatively unembellished statutory language. Indeed, no construction or divination of Congressional intent is necessary. See, e.g., United States v. Murphy, 35 F.3d 143, 145 (4th Cir.1994) ("[I]f the statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and ... the sole function of the courts is to enforce [the statute] according to its terms.").

In the Court's view, the statute is an unambiguous Congressional mandate vesting in the participating states a complete right, title, and interest to the settlement proceeds, excepting only litigation expenses. Hence, there is no ongoing violation of federal law, and Ex parte Young is inapplicable.[4]

The citation is to a bill introduced by Senator Edward Kennedy that would have permitted the Secretary of Health and Human Services to waive recoupment of settlement funds received by a State if a portion was used for tobacco use prevention, health care, and early learning programs. There is no mention of competing legislation. Furthermore, Senator Kennedy himself stated in introductory remarks that "While the federal government could legally demand that the states reimburse Washington from their settlements, I believe the states should be allowed to keep one hundred percent of the money." 145 Cong. Rec. S2503-05 (Mar. 10, 1999) (emphasis added).

4 In making its ruling, the Court is aware of "the 'cardinal rule . . . that repeals by implication are not favored.'" Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Indeed, "An implied amendment or partial repeal of a statute will not be recognized by the courts, unless it clearly appears the legislature so intended." United States v. Joya-Martinez, 947 F.2d 1141, 1144 (4th Cir. 1991). Plaintiffs assert that resort to section 1396b(d)(3)(B)(ii) to trump section 1396k(b) would amount to a finding that Congress impliedly amended the latter with the former. The Court disagrees.

Accordingly, the Court **GRANTS** the State Defendants' motion to dismiss. Further, Defendant Citibank's obligation

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At the outset, section 1396b(d)(3)(B)(ii) may be incorrectly characterized as an implied amendment or partial repeal for at least two different reasons. First, the new statute might simply be a final statement of Congressional intent as to the disposition of tobacco settlement funds without reference to section 1396k(b). Second, one could reasonably assert a recipient-reimbursement obligation arises only after the state has obtained a judgment after a finding of legal liability. See 42 U.S.C. § 1396a(a)(25) (discussing the concept of "legal liability"). Congress' statement concerning disposition of settlement proceeds then, would be a different matter entirely.

Even assuming section 1396b(d)(3)(B)(ii) is properly characterized as an implied amendment or partial repeal, it is equally well-settled that "An intent to repeal can be implied . . . . from 'irreconcilable conflict' between enactments." United States v. King, 824 F.2d 313 (4th Cir. 1987) (quoting Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982)); Patten v. United States, 116 F.3d 1029, 1034 (4th Cir. 1997). Statutory provisions will be considered to be in irreconcilable conflict when there is a "positive repugnancy" between them such that they " 'cannot mutually coexist.'" Mitchell, 29 F.3d at 472 (quoted authority omitted). Section 1396k(b) provides generally that in a State reimbursement action against a liable third party, any "remainder" present after reimbursement of the state and federal share "shall be paid to" the recipient who assigned the claim to the state. Id. In relation to the tobacco settlement, however, Congress specifically and explicitly stated in section 1396b(d)(3)(B)(ii) that the states could "use amounts recovered or paid to the state as part of [the] . . . settlement . . . for any expenditures determined appropriate by the state." Id. (emphasis added). One has difficulty imagining a more clear-cut, explicit conflict. A State cannot use the "amounts recovered or paid . . . for any" purpose if it has a corresponding obligation to take a portion and disburse it to compensate recipients as commanded by 1396k(b). So read, the two provisions are in direct and irreconcilable conflict.

Third, Plaintiffs have not addressed whether the strong presumption against implied amendments retains its full vigor when the implied amendment acts to diminish a private citizen's showing of an ongoing violation of federal law under Ex parte Young. It would seem the presumption might yield, or at least diminish in strength, in the face of what amounts to a private citizen's attempt to hale a state sovereign into federal court to respond with what strongly resembles a retroactive monetary award.

to pay over monies to Plaintiffs from the settlement comes into play only if the Eleventh Amendment does not bar the payment. Consequently, based on the State Defendants' successful claim of immunity, the Court likewise **GRANTS** Citibank's motion to dismiss.

C. Other Issues

The Court has chosen but one of a host of analyses warranting dismissal of Plaintiffs' claims. It is worth noting briefly some of the other grounds upon which dismissal might lie.

1. Limited Assignment Analysis

In Floyd v. Thompson, 227 F.3d 1029 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit posed a very cogent question concerning the extent of the limited assignment given the state by its Medicaid recipients:

> But what exactly was assigned in Wisconsin? If the only thing the individuals assigned was their right to recover the amounts paid by the Medicaid program – not their right to recover any excess – then there is nothing left to distribute to them to which they could have any claim.

Floyd, 227 F.3d at 1035. The answer to that question in West Virginia proves fatal to Plaintiffs' claims. West Virginia's assignment statute provides:

> Submission of an application to the department of health and human resources for medical assistance is, as a matter of law, an assignment of the right of the applicant or legal representative thereof, to recovery from personal insurance or other sources, including, but not limited to, liable third parties, to the extent of the cost of medical services paid for by the medicaid program.

W. Va.Code § 9-5-11 (emphasis added).

The underscored language demonstrates Plaintiffs only partially assigned to the State their claims against any liable third party tobacco defendants. Specifically, Plaintiffs assigned their claims only as to the monies the State expended for their medical treatment, the State share under Section 1396k(b). Accordingly, there is no possibility of a "remainder" under Section 1396k(b) to which Plaintiffs are entitled.

Plaintiffs yet hold the balance of their claims beyond what the State had to pay to care for them. These claims may be asserted at any time, subject to defenses asserted by the tobacco companies. The M.S.A. and West Virginia law specifically preserve Plaintiffs' individual rights of action. See also W. Va.Code § 9-5-11(b) ("Nothing in this section shall be construed so as to prevent the recipient of medical assistance from maintaining an action for injuries received by him against any other person and from including therein, as part of the compensatory damages sought to be recovered, the amount or amounts of his or her medical expenses, even though such person received medical assistance in the payment of such medical expenses, in whole or in part.").

2. Enforcement via Section 1983

In light of section 1396b(d)(3)(B)(ii) and other considerations, it is questionable whether Plaintiffs may now use section 1983 to enforce their claim of a property right to

settlement funds via section 1396k(b).[5] The violation of a federal statute is not actionable under section 1983 if either one of the following is true: (1) the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself." Doe, 225 F.3d at 447. In determining whether a statute creates an individual, enforceable right, this Court applies a well-settled, three-part test:

> [1] Did Congress intend the statutory provision to benefit plaintiff? [2] Is the ostensible right so "vague and amorphous" that its enforcement would prove difficult? And, [3] is the statutory provision at issue

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[5] The Court does not share Plaintiffs' conclusory assertion that utilizing subsection 1396b(d)(3)(B)(ii) "would raise serious retroactivity problems." Opp. Memo. At 22. The amendment applies to amounts paid to a State prior to, on, or after the date of the enactment of this Act." 1999 Emergency Supplemental Appropriations Act, chap. 11, 113 Stat. 57 (1999) (codified as amended at 42 U.S.C. § 1396b(d)(3)(B)(i) and (ii)). The question that first arises is whether a retroactivity analysis is warranted in this specific context. See Booth v. Maryland, 112 F.3d 139, 142 (4th Cir. 1997) ("In Green v. Mansour, for example, the Court ruled that any possible violation of federal law ended when the relevant federal statute was changed, so Ex Parte Young could not apply and the Eleventh Amendment barred the action.").

Assuming retroactivity analysis applies, our Court of Appeals has stated "the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means." Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071, 1076 (4th Cir. 1995). The amendment's paramount purpose was to facilitate implementation of the global resolution of a complex, expensive, and highly contentious litigation among nearly all the states and many tobacco companies. The amendment was spurred by the states' concern their hard-gained settlement proceeds would dwindle in the face of claims by others to M.S.A. monies. Congress chose a rational means to allay those legitimate concerns with the amendments contained in the 1999 Supplemental Appropriations Act.

> phrased in mandatory rather than discretionary terms?

Id. at 448; Prestera, 111 F.Supp.2d at 773-74. Plaintiffs encounter significant problems on the first and second factors.

Regarding the first, Congress' addition of 1396b(d)(3)(B)(ii) at least muddies the question of whether the Plaintiffs were intended beneficiaries in light of the entire statutory scheme. As previously discussed, that amendment treats tobacco settlement monies differently than other state third-party liability recovery actions.

Regarding the second factor, Plaintiffs' claims, reduced to their essence, assert a right to "that portion of the tobacco litigation settlement proceeds that belongs to" them. Pls.' Compl. at 22. The United States Court of Appeals for the Seventh Circuit commented recently on the enforcement of that putative right:

> We add that the administrative problems that would be created by [permitting the claims to go forward] would be nightmarish. As Wisconsin and the other states point out, the total sums of money to be paid under the M.S.A. are not earmarked for different claims. Some of it is to go to educational programs; some of it to research; some to reimbursement of the state's expenses in treating sick people and in supporting families whose wage-earners are disabled from smoking; some is frankly punitive. The final amount to be paid, after 25 years have elapsed, is unknown and unknowable at this point, because it depends partly on how successful the anti-smoking campaigns turn out to be.

Floyd, 227 F.3d at 1038; see also Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908, 924 (5th Cir. 2000) (noting the unavailability of § 1983 for enforcement of statutory rights where "enforcement would strain judicial

competence"). Plaintiffs' asserted right here is subject to the same enforcement obstacles noted in Floyd.

3. The Second Prong of Ex Parte Young

While the Court bases its analysis for dismissal on Plaintiffs' failure under the first prong of Ex Parte Young, virtually every court addressing the issue to date has employed the second prong to dismiss on Eleventh Amendment grounds. See, e.g., Floyd v. Thompson, 111 F.Supp.2d 1097, 1101 (W.D.Wis. 1999) ("Allowing plaintiffs to recover a portion of the settlement funds would be the functional equivalent of retrospective monetary damages paid from the state treasury[.]"); Martin v. State of New Mexico, 197 F.R.D. 694 (D.N.M. 2000); McClendon v. Georgia Dep't of Commun. Health, 4:00cv26-HLM (N.D.Ga. Aug. 28, 2000); Downs v. Commonwealth, No. 00-23 (E.D.Ky. Aug. 31, 2000); White v. Hunt, 5:00cv14-V (W.D.N.C. Jul. 13, 2000); Barton v. Summers, 111 F.Supp.2d 989 (M.D.Tenn. 2000); Harris v. Owens, No. 99-S-953 (D.Colo. Jan. 19, 2000) (Magistrate Judge's Report-Recommendation adopted Jul. 19, 2000). In the alternative, the Court also adopts the analyses performed by these courts.[6]

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[6] Plaintiffs assert the Court can avoid the bar represented by the second prong of the Eleventh Amendment analysis by way of an inventive fiction. In sum, Plaintiffs invite the Court to order a payout from escrow agent Citibank after its receipt of funds from the Tobacco companies, but before transmission of the monies to the state's coffers.

Plaintiffs' analysis is greatly oversimplified. For example, it ignores the concept of bifurcated title. While the tobacco-company depositors retain legal title to the monies once escrowed, West Virginia likely enjoys equitable title to the funds, subject only to computation and award of its allocable share. Plaintiffs avoid discussion of the treatment of this ownership interest under the Eleventh Amendment.

III. CONCLUSION

Based on the foregoing, the Court GRANTS the motions to dismiss, DENIES the motions to stay as moot, and DENIES Plaintiffs' motion for oral argument.

The Clerk is directed to (1) post a copy of this Memorandum Opinion and Order on the Court's public website at www.wvsd.uscourts.gov and (2) send a copy to counsel of record.

ENTER: January 3, 2001

/s/_____
Charles H. Haden II, Chief Judge

From a more practical standpoint, Plaintiffs' proposed result would open a gaping hole in the public fisc. It would permit, by analogy, any seeker of state funds to look for accounts receivable of the State and then attempt to garnish them before their purely ministerial transmission to the treasury. Such a mechanism should not be engrafted onto our system of dual sovereignty.

Finally, Citibank is a mere agent of its many clients, the several sovereign states. Its possession of funds sought by Plaintiffs comes about only through the scope of its agencies. Defenses to and immunities available to its principals protect both the agent and the escrow.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 5:00CV14-V

HILDA WHITE; The Estate of ROBERT CORNELISON, by and through Personal Representative, Helen Forte; MAUDE STRICKLAND; The Estate of ROBERT ELTZ, by and through Personal Representative, Nellie Eltz; The Estate of MARVIN KING, by and through Personal Representative, Donna King; The Estate of MAGGIE IRVING, by and through Personal Representative, Wanda Jones; The Estate of ANNIS MESSER, by and through Personal Representative, Charles Messer; DEBORAH MOREY; The Estate of HESTER HEATHERLY, by and through Personal Representative, Carroll Heatherly; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of North Carolina; JOHN DOE, in his or its official capacity as Tobacco Escrow Agent for the State of North Carolina; HARLAN BOYLES, in his official capacity as Treasurer of North Carolina; H. DAVID BRUTON, M.D., in his official capacity as Secretary of the N.C. Department of Health & Human Services; PAUL R. PERRUZZI, in his official capacity as Director of the Division of Medical Assistance; and, THE GOLDEN L.E.A.F. (Long-term Economic Advancement Foundation), INC., a N.C. Nonprofit Corporation,

Defendants.

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Hilda White, Estate of Robert Cornelison, Maude C. Strickland, Estate of Robert W. Eltz, Estate of Marvin King, Estate of Maggie Irving, Estate of Annis E. Messer, Deborah Morey, and Estate of Hester Heatherly, on behalf of themselves and all others similarly situated, (collectively "Plaintiffs") allege:

NATURE OF THE LAWSUIT

1. This action is brought by and on behalf of some of North Carolina's most powerless citizens – poor people who have suffered death, disease, and debilitation from tobacco use and who are dependent upon the State's Medicaid program to help pay for their medical care.

2. This case arises following the State's successful lawsuit against manufacturers of tobacco products, which was filed and settled in December of 1998. North Carolina is expected to receive in excess of four billion dollars as a result of this lawsuit.

3. Because Defendants have not paid or arranged to pay to Plaintiffs that portion of the settlement proceeds Plaintiffs own as a matter of law, or alternatively to seek Medicaid damages from the tobacco companies, this action has been instituted to protect Plaintiffs' rights.

JURISDICTION AND VENUE

4. The claims in this litigation, which are brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, present questions of federal Constitutional and statutory law. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343.

5. Venue is based upon 28 U.S.C. § 1391(b)(2).

PARTIES

6. Plaintiffs are citizens of the State of North Carolina who suffer from smoking-related illnesses and who have been recipients of medical assistance benefits for those

conditions through North Carolina's Medicaid program, or estates of such citizens.

7. Defendant James B. Hunt, Jr. is Governor of North Carolina and as such is responsible for seeing that North Carolina implements and observes federal law pertaining to the State's administration of the Medicaid program. Defendant Hunt is sued in his official capacity.

8. Defendant John Doe is the escrow agent designated by the parties to the Master Settlement Agreement to receive, manage, and disburse the settlement monies to be paid by the tobacco companies to the State.

9. Defendant Harlan Boyles is Treasurer of North Carolina and as such is responsible for the receipt, safekeeping, investment, administration, and disbursement of funds directed to the State of North Carolina from its tobacco litigation settlement. Defendant Boyles is sued in his official capacity.

10. Defendant H. David Bruton, M.D. is the Secretary of the North Carolina Department of Health and Human Services. As such, he is responsible for establishing and implementing policies and practices of the Department, including policies and practices for the recovery and disbursement of money paid through the Medicaid program. Defendant Bruton is sued in his official capacity.

11. Defendant Paul R. Perruzzi is the Director of the Division of Medical Assistance of the North Carolina Department of Health and Human Services. As such, he is responsible for enforcing the recovery policies and practices at issue in this action. Defendant Perruzzi is sued in his official capacity.

12. Defendant The Golden L.E.A.F. (Long-Term Economic Advancement Foundation), Inc. is a non-profit corporation established under and existing by virtue of the laws of the State of North Carolina which, upon information

and belief, will receive funds from the tobacco litigation settlement on behalf of North Carolina.

13. At all times relevant to this Complaint, Defendants have acted and will act under color of State law.

THE MEDICAID PROGRAM

14. Medicaid is a federal program that provides medical assistance to eligible low-income persons. It is administered by the States under a cooperative federal-state funding scheme.

15. Although States are not required to participate in Medicaid, if a State chooses to do so it must follow federal Medicaid law. North Carolina participates in the Medicaid program; its program of medical assistance is authorized by N.C.G.S. § 108A-54.

16. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds under the Medicaid program, North Carolina was required to submit a comprehensive written statement, called a State Plan,to the United States Department of Health and Human Services, Health Care Financing Administration ("HCFA"). Upon Information and belief, the State Plan describes the nature and scope of North Carolina's Medicaid program and gives assurances that the program will be administered in conformity with the requirements of the Medicaid Act and all applicable federal regulations.

17. Upon information and belief, North Carolina has received millions of dollars in federal Medicaid funds in exchange for the State's promise to abide by its State Plan and to Administer its Medicaid program in compliance with federal law.

MEDICAID THIRD-PARTY RECOVERY AND DISBURSEMENT REQUIREMENTS

18. The Medicaid Act, at 42 U.S.C. §1396a(25)(A) and (B), requires each State in its State Plan to agree to "take all

reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the plan," and "in case where such a legal liability is found to exist after medical assistance has been made available . . . [to] seek reimbursement for such assistance to the extent of such legal liability."

19. The Act's implementing regulations, at 42 C.F.R. § 433.138(a), echo this requirement, providing that the State "must take reasonable measures to determine the legal liability of the third parties who are liable to pay for services furnished under the plan."

20. To effectuate recovery from responsible third parties, 42 U.S.C. § 1396a(45) requires that each State Plan "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients."

21. Once the State recovers from responsible third parties, the Medicaid Act and its regulations govern precisely how those amounts are to be disbursed. Specifically, Title 42 U.S.C. § 1396k provides that: [s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

22. Similarly, Title 42 C.F.R. § 433.154 mandates that the State "must distribute" to the individual Medical recipient all amounts recovered from responsible third parties in excess of what is required to reimburse the State and federal governments for medical payments made on behalf of those recipients.

23. As explained by HCFA in its official commentary published in the Federal Register at the time that § 433.154 was codified, the Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally-mandated distribution requirement ensures that both the State and federal governments are made whole, with the balance of any recovery going to the injured party.

24. In North Carolina, Medicaid recipients are required to assign their rights to the State automatically when they accept medical assistance under the Medicaid Program. See N.C.G.S. § 108A-59(a) ("by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled.")

25. This assignment is a complete assignment. See N.C.G.S. § 108A-57(a) ("the State . . . shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of [medical] assistance, or the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person.") (emphasis added)

26. Federal regulations, at 42 C.F.R. § 433.151(b), require that North Carolina's State Plan "must provide that the requirements . . . for distributing third party collections specified in [section] 433.154 are met."

27. If North Carolina fails to comply with the third-party recovery provisions of the Medicaid Act funds (42 C.F.R § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of the State's poorest citizens, including Plaintiffs.

THE TOBACCO LITIGATION IN NORTH CAROLINA

28. On or about November 16, 1998, Attorney General Michael Easley, on behalf of North Carolina, entered into a

Master Settlement Agreement ("MSA") with the major tobacco companies, whereby North Carolina agreed to forever release and discharge its claims against the tobacco industry in exchange for perpetual, periodic cash payments. Over the next 25 years, these payments are expected to total approximately $4.6 billion. The tobacco companies made an initial payment on or about December 21, 1999 of $57,584,748.10.

29. As part of the MSA, North Carolina, which had not filed suit against the tobacco companies at the time of the settlement, agreed to bring litigation against the industry that would be settled under the terms of the MSA. Suits that were previously filed in other jurisdictions were also settled by the MSA.

30. On December 21, 1998 at 12:58 p.m. the State filed State of North Carolina ex. rel. Michael F. Easley v. Philip Morris Incorporated et al,(98 CVS 14377), in the Superior Court of Wake County against the tobacco industry ("North Carolina's tobacco litigation").

31. The State's Complaint included the following allegations:

> In fulfilling its statutory duties, the State of North Carolina has expended and will continue to expend substantial sums of money, in the amount of billions of dollars, to provide health care services for treatment of illnesses caused or exacerbated by tobacco use. These expenditures have been caused by the Defendants' unlawful conduct alleged herein. As a result, the State of North Carolina has incurred direct economic losses, amounting to billions of dollars for treatment of tobacco related illnesses under all applicable medical assistance programs and the state funded health insurance plan. These expenditures have been caused by the unlawful acts of the Defendants. State v. Philip Morris et. al., Complaint at ¶ 40.

32. Besides injunctive relief, the State in its prayer for relief sought to recover two types of monetary relief: 1) "damages for the past and future medical costs paid by North Carolina to medical assistance beneficiaries, state employees and others for treatment of tobacco-related illnesses" and 2) attorneys' fees.

33. Also on December 21, 1998, after the State's Complaint was filed, the following action occurred:

1:18 p.m. The parties filed an Agreed Motion for Stay of Proceedings.

1:24 p.m. The parties filed an Agreed Motion for Approval of Settlement Agreement and Entry of Consent Decree and Final Judgment.

2:05 p.m. An Order Granting Stay of Proceedings was filed.

2:06 p.m. An Agreed Dismissal Order was filed.

2:07 p.m. A Consent decree and final judgment was filed.

DEFENDANTS' FAILURE TO DISBURSE A PORTION OF THE TOBACCO LITIGATION SETTLEMENT TO PLAINTIFFS

34. North Carolina's tobacco litigation was filed against the tobacco industry because the state recognized the companies to be third parties legally liable for causing Medicaid recipients' sickness, injury, disability, and death.

35. Once the State identified the tobacco companies as responsible third parties within the meaning of the Medicaid Act, responsible third parties within the meaning of the Medicaid Act, federal law compelled the State to seek from them reimbursement of all monies paid through North Carolina's Medicaid program on behalf of persons injured by tobacco use.

36. The State's Complaint reveals that the central element of damages claimed by the State was the cost of

medical payments made through North Carolina's Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

37. In addition, the MSA expressly declares that no settlement payments are made "in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or . . . the cost of tangible or intangible asset or other future benefit."

38. Upon information and belief, the approximately $4.6 billion that North Carolina has already begun receiving from the tobacco companies exceeds the amount of funds the State has actually paid, or might in the future pay, on behalf of Medicaid recipients who have suffered smoking-related injuries.

39. This excess recovery belongs to Plaintiffs, and it must be disbursed to them.

40. Notwithstanding the fact that the State's lawsuit explicitly sought to recover monies paid through the Medicaid program, North Carolina has taken no steps to disburse to Plaintiffs any portion of the settlement amount or to inform Plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled.

41. The State has indicated that no part of the MSA proceeds will be paid to Plaintiffs by its passage of Senate Bill 6, which designates the tobacco litigation settlement proceeds will be apportioned as follows: 50% to Defendant the Golden L.E.A.F.; 25% to a trust to be established for the benefit of tobacco producers and others; and 25% to a trust to be established for the benefit of health. A copy of Senate Bill 6 is attached as Exhibit A.

42. The drafters of the MSA took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though the State was explicitly seeking to recover medical expenditures, and even though distribution of the settlement proceeds under the MSA

mirrors each State's proportionate share of tobacco-related Medicaid expenditures. It has been admitted by various State governors and by the Notional Governors Association, for example, that "[o]ur State's Attorneys General carefully crafted that tobacco agreement to reflect only State costs."

43. The States were motivated to "carefully craft" the MSA in this way so that they could attempt to avoid recovery to the federal government. as required by the Medicaid Act.

44. Further, the National Governor's Association worked to "develop a strategy aimed at preventing the federal government's seizure of State tobacco settlement funds," since the States, including North Carolina, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

45. In May 1999, as a result of a lobbying campaign by the States, Congress amended the Medicaid Act, 42 U.S.C. § 1396b(d), waiving the federal government's entitlement to its portion of the MSA proceeds. This legislation was described by the National Governor's Association as the Governors' "number one legislative priority."

46. The Amendment to section 1396b(d) did not alter North Carolina's legal obligation to disburse to Plaintiffs that portion of the settlement monies received by the State that exceeds the State's Medicaid costs.

DEFENDANTS' FAILURE TO COMPLY WITH FEDERAL LAW

47. Defendants for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable for medical assistance payments made through North Carolina's Medicaid program.

48. This knowledge led the State to commence and settle its lawsuit against the tobacco industry to recover "past and future medical costs paid by North Carolina to medical

assistance beneficiaries, State employees and others for treatment of tobacco related illnesses." The central element of damages claimed by the State was medical costs paid by the State.

49. These medical cost were also the central element of State's settlement with the tobacco defendants. The MSA expressly declares that no settlement payments are made "in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or . . . the cost of a tangible or intangible asset or other future benefit."

50. Pursuant to the terms of the MSA, North Carolina has forever waived its right to litigate any theories of Medicaid recovery against the tobacco companies or to seek from them any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of Plaintiffs' claims or otherwise.

51. Plaintiffs allege that the State's lawsuit against the tobacco companies was, as it appears, an action seeking recovery of hundreds of millions of dollars in medical payments and that the State has violated federal law by refusing to disburse a portion of the settlement monies directly to Plaintiffs.

52. However, if North Carolina's tobacco litigation were not a Medicaid recovery action, the State has violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies as compelled by the Medicaid Act and accompanying regulations. This action has resulted in a taking of Plaintiffs' rights, without due process, to any excess funds that would have been recovered, which is prohibited by the United States Constitution.

53. Whether the State is in violation of the Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies or by failing to distribute to Plaintiffs, or make provision for the distribution to Plaintiffs, a part of the tobacco litigation settlement, the

state has illegally deprived and continues to deprive Plaintiffs of their rights and property in violation of federal law.

54. In addition, Defendants' conduct threatens North Carolina's entitlement to federal Medicaid funds, endangers Plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well-being of tens of thousands of North Carolina's poorest citizens, including Plaintiffs.

CLASS ACTION ALLEGATIONS

55. Plaintiffs Hilda White, Estate of Robert Cornelison, Maude C. Strickland, Estate of Robert W. Eltz, Estate of Marvin King, Estate of Maggie Irving, Estate of Annis Messer, Deborah Morey, and Estate of Hester Heatherly, bring this action on behalf of themselves and all other persons who have received medical assistance through North Carolina's Medicaid program for tobacco-related diseases or injuries, or who are the heirs or guardians of such Medicaid recipients.

56. This action is maintainable as a class action under Rule of Civil Procedure 23, paragraphs (a), (b)(1)(a) and (b)(2).

57. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs fairly and adequately represent the interests of the class.

58. The prosecution of separate actions by individual members of the class would create the risk of inconsistent adjudications, which would establish incompatible standards of conduct for Defendants.

59. Defendants have acted or refused to act on grounds generally applicable to all members of the proposed class, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment 28 U.S.C. § 2201)

60. Plaintiffs reallege and incorporate by reference the allegations set forth in the above paragraphs as if they were restated herein.

61. There is an actual controversy between the parties. Plaintiffs contend that Defendants have failed to comply with the third-party recovery provisions of the Medicaid Act and regulations, including those provisions requiring the disbursement of recovered funds to Plaintiffs. Upon information and belief, Defendants contend that they have complied with the law.

62. Plaintiffs have suffered, are continuing to suffer, and are threatened with suffering irreparable injury.

63. Plaintiffs have no adequate remedy at law to redress the violations of their interests alleged herein.

64. Plaintiffs are entitled to a declaration of their rights and defendants' obligations with respect to the integrity of North Carolina's Medicaid program insofar as Defendants' failure to comply with federal law imperils the State's continued receipt of federal funds and endangers the public assistance programs upon which Plaintiffs rely to maintain their health and well-being.

65. Plaintiffs are also entitled to a declaration of their rights and Defendants' obligations with respect to the provisions of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

SECOND CLAIM FOR RELIEF
(Deprivation of Property Without Due Process)
Fourteenth Amendment to the U.S. Constitution

66. Plaintiffs reallege and incorporate by reference the allegations set forth in the above paragraphs as if they were restated herein.

67. Defendants have deprived Plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

68. Among other things, Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) Plaintiffs' property interest in their claims – or causes of action – for payment of that portion of the litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations, and (c) the value of the rights assigned by Plaintiffs to the State as a condition of Medicaid eligibility, which value includes, but is not limited to, all amounts recovered by the State in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

THIRD CLAIM FOR RELIEF

(Taking of Property Without Just Compensation)

Fifth and Fourteenth Amendments to the U.S. Constitution

69. Plaintiffs reallege and incorporate by reference the allegations set forth in the above paragraphs as if they were restated herein.

70. Defendants have taken Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth amendments to the United States Constitution.

71. Among other things, Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) Plaintiffs property interest in their claims - - or causes of action - - for payment of that portion of the tobacco litigation settlements of the Medicaid Act and federal regulations, and

(c) the value of the rights assigned by Plaintiffs to the State as a condition of Medicaid eligibility, which value includes, but is not limited to, all amounts recovered by the State in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

72. Defendants' decision to take Plaintiffs' property is a final decision.

73. The MSA having become final, and the State's tobacco lawsuit having been dismissed with prejudice, no available State procedures or adequate State process exists for Plaintiffs to seek just compensation.

FOURTH CLAIM FOR RELIEF
(Violation of the Medicaid Act's Disbursement Requirements)

74. Plaintiffs reallege and incorporate by reference the allegations set forth in the above paragraphs as if they were restated herein.

75. Defendants have violated and are violating federal law by failing to disburse properly funds that North Carolina has recovered from the tobacco companies, as compelled by the Medicaid Act and governing federal regulations.

FIFTH CLAIM FOR RELIEF
(Violation of the Medicaid Act's Recovery Requirements)

76. Plaintiffs reallege and incorporate by reference the allegations set forth in the above paragraphs as if they were restated herein.

77. To the extent Defendants claim that North Carolina's lawsuit against the tobacco companies was not a Medicaid recovery action as compelled by the Medicaid Act, Defendants have violated and are violating federal law by failing to seek reimbursement of medical assistance payments made through the State Medicaid program from known legally responsible tobacco companies, pursuant to

the requirements of the Medicaid Act and governing federal regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For entry of an order certifying the class described above;

2. That as to the amount the State is entitled to receive pursuant to the tobacco litigation settlement, for entry of an order declaring that any portion of such amount which is in excess of the State funds expended through the Medicaid program for Plaintiffs' medical care for tobacco-related illnesses, must be paid to Plaintiffs;

3. For entry of an order declaring that the scheme for distribution of the tobacco litigation settlement funds as codified in Senate Bill 6 is ineffective and invalid as to that portion of those funds which are in excess of the State funds expended through the Medicaid program for Plaintiffs' medical care for tobacco-related illnesses;

4. For preliminary and permanent injunctive relief mandating that Defendants disburse to Plaintiffs, or cause the disbursement to Plaintiffs of, those portions of the tobacco litigation settlement payments which belong to Plaintiffs before such payments are deposited in the State treasury or are in the possession, custody, or control of the State treasury or are in the possession, custody, or control of the State or Defendants;

5. Alternatively, for preliminary and permanent injunctive relief mandating either that Defendants return to Plaintiffs any and all property rights taken from them or that Defendants provide just compensation to Plaintiffs for the value of the property or property rights taken;

6. Alternatively, for preliminary and permanent injunctive relief mandating that Defendants provide to

Plaintiffs due process of law concerning all property rights that have been taken from Plaintiffs;

7. Alternatively, for preliminary injunctive relief mandating that Defendants cause all past and future tobacco litigation settlement payments to be made to the Clerk of Court rather than Defendant Doe pending entry of further orders of final judgment in this case;

8. Alternatively, for entry of an order declaring that Defendant s are required by the Medicaid Act and federal regulations to seek reimbursement of Medicaid payments made through the State Medicaid program from known legally third-parties, such as those tobacco companies already identified by the State, and to disburse all amounts recovered in such third-party reimbursement actions according to the requirements of the Medicaid Act, including, but not limited to, disbursement to Plaintiffs of any amounts recovered in excess of payments made through the State Medicaid program.

9. For a trial by jury;

10. For costs and reasonable attorneys' fees; and,

11. For such further relief as the Court deems just and proper.

This 26th day of January, 2000.

ATTORNEYS FOR PLAINTIFFS:
Van Winkle, Buck, Wall, Starnes and Davis, P.A.
/s/_____

Larry McDevitt, N.C. Bar #5032
W. Perry Fisher, N.C. Bar #14153
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Post Office Box 7376
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APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Civil Action No. 6:00-324-24

STEPHEN ALBERT JOSEPH, JR.; SELMA CHARLENE HATFIELD; HOWARD S. MILLER; ANNIE SAMS MOSTELLER; DEBORAH KAY MULLINS; MAMIE BREWER, PERSONAL REPRESENTATIVE OF THE ESTATE OF CALVIN BREWER; BRENDA CARSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF BONDALE CARSON MILER; MARGARET RENEE FLEMING, PERSONAL REPRESENTATIVE OF THE ESTATE OF ERNESTINE FLEMING; LAURA KELLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH MCABEE; ALFORD WELBORNE, INDIVIDUALLY AND ON BEHALF OF THE OTHERS SIMILARLY SITUATED;

Plaintiffs,

v.

CHARLES M. CONDON, ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; SAM GRISWOLD, DIRECTOR, DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF HEALTH AND HUMAN SERVICES; CITIBANK, N.A., IN ITS OFFICIAL CAPACITY AS ESCROW AGENT,

Defendants.

AMENDED
CLASS ACTION COMPLAINT

1. This action is brought by and on behalf of the poorest, weakest, and most infirm citizens of the State of

South Carolina-a voiceless group with virtually no political or economic power. This group of poor people have suffered sickness, injury, and/or death as a result of their use of tobacco and are dependent upon the Medicaid program to pay for their medical care.

2. South Carolina receives hundreds of millions of dollars in federal funds by virtue of its participation in the Medicaid program. Federal law requires that in order to participate in the Medicaid program, South Carolina comply with the requirements of the Medicaid Act as well as related federal regulations.

3. Specifically, federal law requires the agency administering the South Carolina Medicaid program: (a) to attempt to recover the amount of the medical assistance payments from third parties who are responsible for causing the Medicaid recipients' sickness, injury, and/or death, and (b) to disburse to the injured Medicaid recipients any portion of the funds collected from those responsible third parties in excess of the amount of the medical assistance payments made by South Carolina.

4. This case arises following a successful lawsuit by South Carolina against manufacturers of tobacco products filed in the Court of Common Pleas of Richland County South Carolina on May 12, 1997. See South Carolina v. Brown & Williamson Tobacco Corp., 97-CP-40-1686 (Ct. Common Please, Richland County, S.C. filed May 12, 1997). In the course of that litigation, in numerous pleadings filed with the court and in countless public pronouncements, South Carolina officials including Defendant Attorney General Charles M. Condon ("Condon") identified the tobacco-company defendants as third parties legally liable for causing Medicaid recipients' sickness, injury and/or death.

5. Once South Carolina identified the tobacco companies as responsible third parties within the meaning of The Medicaid Act, federal law compelled the state to seek

from those companies reimbursement of all monies paid through the State Medicaid program on behalf of persons injured by tobacco use. In its Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), for example, South Carolina acknowledged the force of its Medicaid obligation by stating "The plain language of [the Medicaid Act] ... simply states that if [a state] wants to receive Medicaid funds, the State must pursue liable third parties in those instances where it is economically practicable."

6. Moreover, the complaint filed by South Carolina against the tobacco companies alleged that "[t]he State of South Carolina spends millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of indigents and other eligible residents whose health care costs are caused by tobacco-induced cardiovascular disease, lung cancer, emphysema and other respiratory diseases as well as complications of pregnancy and childbirth, including but not limited to low birth-weight babies." The South Carolina Complaint also alleged that as a result of the actions of the tobacco defendants:

> residents of the State of South Carolina have suffered injuries in the form of addiction, cancer and other illnesses and disease. Many of these residents of the state are Medicaid or publicly-funded health care recipients. As a direct and proximate result of [the tobacco companies' actions], the State of South Carolina has borne and will continue to bear the massive costs of these illnesses and diseases by providing necessary medical care, facilities, and services, for which [South Carolina] is entitled to an award of actual and punitive damages in an amount to be determined at the trial of this action.

7. In addition to its complaint, numerous other pleadings and official statements made by state officials,

including Defendant Condon, in the course of South Carolina's lawsuit against the tobacco companies, reveal that the central element of damages claimed by the state was the cost of medical payments made through the state Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

8. On November 23, 1998, South Carolina settled its lawsuit with the tobacco companies pursuant to a Master Settlement Agreement (MSA"). Under the MSA, the state agreed to dismiss the suit and forever release and discharge the tobacco defendants in exchange for cash payments in an amount in excess of $2.3 billion, the bulk of which is to be paid to South Carolina in annual payments over the next 25 years. The state dismissed its lawsuit against the tobacco companies December 31, 1998, and South Carolina was due to receive its first payment of approximately $29 million dollars in December 1999.

9. Notwithstanding the fact that the lawsuit by the State against the tobacco companies explicitly sought to recover monies paid through South Carolina's Medicaid program, South Carolina officials have claimed that the lawsuit was not a Medicaid recovery action as compelled by the Medicaid Act, and that it is therefore not required to disburse the settlement proceeds according to the requirements of federal law. The state has taken no steps to disburse to the plaintiffs any portion of the settlement amount or to inform the plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled.

10. If, as the state claims, its suit against the tobacco companies was not a Medicaid recovery action, then, even in the face of its own repeated acknowledgment that the tobacco companies are third parties responsible for Medicaid recipients sickness, injury, and/or death, South Carolina has violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies

as compelled by the Medicaid Act and applicable federal regulations.

11. If the lawsuit by the state against the tobacco companies for the recovery of hundreds of millions of dollars in medical payments was, as it clearly appears, a recovery action compelled by the Medicaid Act, then the State has violated federal law by refusing to comply with those provisions of the Medicaid Act that obligate it to disburse a portion of the settlement monies directly to the plaintiffs.

12. Whether South Carolina is violating the Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies or whether it is violating the Medicaid Act by failing to distribute to the Plaintiffs a part of the settlement monies it has already recovered from those companies, South Carolina has illegally deprived and continues to deprive the Plaintiffs of their rights and their property in violation of federal law and the United States Constitution.

13. Defendants' failure to comply with federal law not only deprives Plaintiffs of rights and property secured by federal law and the Constitution, but further threatens the entitlement of South Carolina to federal Medicaid funds, endangers the Plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well-being of tens of thousands the poorest citizens of South Carolina, including Plaintiffs. This Complaint for declaratory and injunctive relief seeks to compel South Carolina officials to comply with their duties under federal law.

Jurisdiction and Venue

14. This action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

15. Venue is based upon 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to the

claims herein arose in the Greenville District of South Carolina.

Parties

16. Plaintiff Stephen Albert Joseph, Jr., is a resident of Greenwood County South Carolina who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

17. Plaintiff Mamie Brewer is the Persona Representative of the Estate of Calvin Brewer. Mr. Brewer was a resident of Greenwood County South Carolina who suffered from smoking-related illness, including lung cancer, and was a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

18. Plaintiff Brenda Carson is the Personal Representative of the Estate of Blondale Carson Miller. Ms. Miller was a resident of Spartanburg County South Carolina, suffered from smoking-related illness, and was a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

19. Plaintiff Margaret Renee Fleming is Personal Representative of the Estate of Ernestine Fleming. Ms. Fleming was a resident of Pickens County South Carolina, suffered from smoking-related illness, and was a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

20. Plaintiff Selma Charlene Hatfield is a resident of Pickens County South Carolina who suffers from smoking-related illness and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

21. Plaintiff Laura Kelly is the Personal Representative of the Estate of Elizabeth McAbee. Ms. McAbee was a resident of Spartanburg County South Carolina, suffered from smoking-related illness, and was a recipient of medical

assistance benefits for that condition through the South Carolina Medicaid program.

22. Plaintiff Howard S. Miller is a resident of Greenville County South Carolina who suffers from smoking-related illness, and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

23. Plaintiff Annie Sams Mosteller is a resident of Greenville County South Carolina who suffers from smoking-related illness, and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

24. Plaintiff Deborah Kay Mullins is a resident of Greenville County South Carolina who suffers from smoking-related illness, and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

25. Plaintiff Alford Welborn is a resident of Anderson County South Carolina who suffers from smoking-related illness, and has been a recipient of medical assistance benefits for that condition through the South Carolina Medicaid program.

26. Defendant Condon, as Attorney General, was responsible for prosecuting and settling the tobacco litigation on behalf of South Carolina. Defendant Condon is sued in his official capacity as the Attorney General of the State of South Carolina.

27. Defendant Sam Griswold is the Director of the South Carolina Department of Health and Human Services and is responsible for establishing a system of orderly development of a state policy to ensure that essential services of planning, financing and administration of interagency health and human service programs are carried out in the most efficient manner, including administration of the South Carolina Medicaid program.

28. Defendant Citibank, N.A., 111 Wall Street, New York, NY, is the Escrow Agent designated by the parties to the tobacco litigation MSA to receive, manage, and disburse the settlement monies to be paid by the tobacco company defendants to South Carolina. Citibank, N.A., in its capacity as the designated escrow agent, is an agent and representative of the State acting under color of law.

29. At all times relevant to this Complaint, Defendants Condon, Griswold, and Citibank, N.A. were acting under color of law.

Class Action Allegations

30. This action is maintainable as a class action under the Federal Rules of Civil Procedure 23, paragraphs (a), (b)(1)(A) and (b)(2).

31. Plaintiffs Stephen Albert Joseph, Jr.; Mamie Brewer, Personal Representative of the Estate of Calvin Brewer; Brenda Carson, Personal Representative of the Estate of Bondale Carson Miller; Margaret Renee Fleming, Personal Representative of the Estate of Ernestine Fleming; Selma Charlene Hatfield; Laura Kelly, Personal Representative of the Estate of Elizabeth McAbee; Howard S. Miller; Annie Sams Mosteller; Deborah Kay Mullins; and Alford Welborne bring this action on behalf of themselves and all other persons who received medical assistance through the South Carolina Medicaid program for tobacco-related sickness, disease, and/or injury, or who are the heirs or guardians of such Medicaid recipients.

32. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately represent the interests of the class.

33. The prosecution of separate actions by individual members of the class would create the risk of inconsistent

adjudications, which would establish incompatible standards of conduct for Defendants.

34. Defendants have acted or refused to act on grounds generally applicable to all members of the proposed class, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

The Medicaid Program

35. Medicaid is a federal program of medical assistance to eligible low-income persons administered by the states under the cooperative federal-state funding scheme. Although a state is not required to participate in Medicaid, if a state chooses to do so, it must conform to federal Medicaid law.

36. South Carolina participates in the Medicaid program. South Carolina's program of medical assistance to low-income persons is codified at S.C. Code Ann. § 43-7-50 through § 42-7-460.

37. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds, South Carolina was required to submit to the United States Department of Health and Human Services, the Health Care Financing Administration (HCFA), a comprehensive written statement called a State Plan describing the nature and scope of its Medicaid program and giving assurance that the program will be administered in conformity with the requirements of the Medicaid Act and all applicable federal regulations.

38. HCFA has approved the State Plan, and South Carolina has received hundreds and hundreds of millions of dollars in federal Medicaid funds in exchange for the State's commitment to abide by the Plan and to administer its program in compliance with federal law.

Medicaid Third-Party Recovery and Disbursement Requirements

39. The Medicaid Act, at 42 U.S.C. § 1396a(25)(A) and (B), requires each state in its State Plan to agree (a) "to take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services under the plan," and (b) "in any case where legal liability is found to exist after medical assistance has been made available ... [to] seek reimbursement for such assistance to the extent of such legal liability."

40. The implementing regulations of the Medicaid Act provide that the state "must take reasonable measures to determine the legal liability of third parties who are liable to pay for services furnished under the plan." 42 C.F.R. § 433.138(a) (emphasis added).

41. In order to effectuate recovery from responsible third parties, the Medicaid Act requires that each State Plan must "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients." 42 U.S.C. § 1396a(45).

42. In South Carolina, Medicaid recipients are deemed to have made an automatic assignment to the State "by the act of ... receiving medical assistance" through the State Medicaid program. S.C. Code Ann. § 43-7-420.

43. The Medicaid Act and its regulations also set forth specific mandatory rules governing disbursement of amounts recovered from responsible third parties.

44. Title 42 U.S.C. § 1396k provides that [s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the federal government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected *shall* be paid to such individual." (Emphasis added.)

45. Applicable regulations similarly mandate that the state "must distribute" to the individual Medicaid recipients all amounts recovered from responsible third parties in excess of what is required to reimburse the state and federal Medicaid programs for medical payments made on behalf of those recipients. 42 C.F.R. § 433.154 (emphasis added).

46. As explained by HCFA in its official commentary published in the Federal Register at the time that 433.154 was codified, the Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally mandated distribution requirement ensures that both the state and federal government are made whole, with the balance of any recovery going to the injured party.

47. Federal regulations require that all State Plans "must provide that the requirements ... for distributing third party collections specified in 433.154 are met." 42 C.F.R. § 433.151.

48. In its State Plan, South Carolina promises HCFA that it meets all requirements of 42 C.F.R. § 433.154.

49. If South Carolina fails to comply with the third party recovery provisions of the Medicaid Act, it will lose its entitlement to federal Medicaid funds, see 42 C.F.R. § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of the poorest citizens of South Carolina, including Plaintiffs.

The Failure of the State to Comply with Federal Law

50. Defendants know and for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable, within the meaning of the Medicaid Act, for medical assistance payments made through the South Carolina Medicaid program.

51. This knowledge led South Carolina to commence a lawsuit on May 12, 1997 against various manufacturers of tobacco products and other tobacco industry defendants, asserting that their misconduct injured the State by increasing the costs of health care benefits paid by South Carolina through its Medicaid program. See South Carolina v. Brown & Williamson Tobacco Corp., 97-CP-40-1686 (Ct. Common Please, Richland County, S.C. filed May 12, 1997).

52. South Carolina asserted various counts against the tobacco defendants, but the consistent central element of actual damages was "the massive costs" to the State of "providing necessary medical care, facilities, and services" to Medicaid recipients. Moreover, the Master Settlement Agreement expressly declares that no settlement payments are made "in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or ... the cost of a tangible or intangible asset or other future benefit."

53. Pursuant to the specific terms of the Master Settlement Agreement and the release executed by the state of the tobacco companies, South Carolina has forever waived its right to litigate any theories of Medicaid recovery against the tobacco companies or to seek from the tobacco companies any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of Plaintiffs' claims or otherwise.

54. The parties to the MSA, including Defendant Condon, took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though the Complaint filed by South Carolina explicitly sought to recover medical expenditures, and even though distribution of the settlement proceeds under the MSA mirrors each state's proportionate share of tobacco-related expenditures. It has been admitted by various state governors and by the National Governors Association, for example, that "[o]ur

states' Attorneys General carefully crafted the tobacco agreement to reflect only state costs."

55. The states were motivated to "carefully craft" the MSA in this way so that they could attempt to avoid their legal obligations to disburse a portion of the recovery to the federal government, as required by the Medicaid Act.

56. It is a matter of public record, for example, that one of the top priorities of the National Governors Association was to "develop a strategy aimed at preventing the federal government's seizure of state tobacco settlement funds," and that states, including South Carolina, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

57. In May, 1999, as a result of the states' lobbying efforts to avoid paying any of the tobacco settlement monies to HCFA, Congress amended the Medicaid Act, see 42 U.S.C. § 1396b(d), to add language waiving the federal government's entitlement to its portion of the settlement proceeds. This legislation was described by the National Governors Association as the governors' "number one legislative priority."

58. The amendment to § 1396b(d), however, does not alter the legal obligation of the states to disburse to Plaintiffs that portion of the settlement monies that exceeds the Medicaid costs they incurred. Congress did not alter or amend any section of the Medicaid Act affecting the disbursement obligation of the state to Medicaid recipients.

59. The $2.3 billion that South Carolina is poised to receive from the tobacco companies exceeds even the most generous estimates of what the state has actually paid, or might in the future pay, on behalf of Medicaid recipients in this state who have suffered smoking-related injuries.

60. This excess recovery belongs to Plaintiffs, and it must be disbursed to them.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment, 28 U.S.C. § 2201)

61. Plaintiffs re-allege and incorporate herein by reference each and every allegation of Paragraph 1 through 60.

62. There is an actual controversy between the parties. Plaintiffs content that the Defendants have failed to comply with the third party recovery provisions of the Medicaid Act and regulations, including those provisions that govern the disbursement of recovered funds to the Plaintiffs. Defendants contend that they have complied with federal law.

63. Plaintiffs, and all members of the Plaintiff Class, have suffered, and continue to suffer and are threatened with suffering irreparable injury.

64. Plaintiffs, and all members of the Plaintiff Class, have no adequate remedy at law to redress the violations of the law alleged herein.

65. The Plaintiffs are entitled to a declaration of their rights and the Defendants' obligations with respect to the integrity of South Carolina's Medicaid program insofar as the Defendants' failure to comply with federal laws imperils continued receipt of federal funds and endangers the public assistance program upon which Plaintiffs rely to maintain their health and well-being.

66. The Plaintiffs are also entitled to a declaration of their rights and the Defendants' obligations with respect to the provision of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

SECOND CLAIM FOR RELIEF

(Deprivation of Property Without Due Process)

67. Plaintiffs reallege and incorporate herein by reference each and every allegations of Paragraphs 1 through 66.

68. Defendants have deprived Plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

69. Among other things, Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; (b) Plaintiffs' property interest in their claims—or causes of action—against the tobacco defendants for reimbursement of tobacco-related health care costs and other tobacco-related damages, and (c) the value of the rights assigned by Plaintiffs to South Carolina as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the State in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

THIRD CLAIM FOR RELIEF

(Taking of Property Without Just Compensation)

70. Plaintiffs re-allege and incorporate herein by reference each and every allegations of Paragraphs 1 through 69.

71. Defendants have taken Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

72. Among other things, Defendants have deprived Plaintiffs of: Among other things, Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; (b) Plaintiffs' property interest in their claims—or causes of action—against the tobacco defendants for reimbursement of tobacco-related health care costs and other tobacco-related damages, and (c) the value of the rights assigned by

Plaintiffs to South Carolina as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the State in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

73. Defendants' decision to take Plaintiffs' property was expressed in, among other things, the tobacco litigation MSA and public statements made by South Carolina officials in the tobacco litigation. These statements include admissions made by the State in its opposition to a motion to intervene brought by a class of individuals seeking to recover damages for tobacco related illnesses. The State contended that intervention was not appropriate because

> [a]lthough the moving parties claim an interest in the settlement proceeds, the General Assembly has already acted to appropriate the money. Pursuant to S.C. Code Ann. § 1-7-150 (Supp. 1998) all monies "awarded to the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State ... must be deposited in the general fund of the State." In the 1998 Appropriations Bill, the General Assembly affirmatively allocated these settlement proceeds to the State's general fund and dictated that the funds were "to be appropriated by the General Assembly." 1997 SC H.B. 4700, 112th Sess., part 72.95.

Defendants' decision to take Plaintiffs' property is a final decision.

74. The MSA having become final, and the tobacco lawsuit by South Carolina having been dismissed with prejudice, no available state procedures or adequate state process exists for Plaintiffs to seek just compensation.

FOURTH CLAIM FOR RELIEF

(Violation of the Disbursement Requirements of the Medicaid Act)

75. Plaintiffs re-allege and incorporate herein by reference each and every allegation of Paragraphs 1 through 74.

76. Defendants have violated and are violating federal law by failing to disburse properly funds that South Carolina has recovered from legally responsible tobacco companies, as compelled by the Medicaid Act and governing federal regulations.

FIFTH CLAIM FOR RELIEF
(Violation of the Recovery Requirements of the Medicaid Act)

77. Plaintiffs re-allege and incorporate herein by reference each and every allegation of Paragraphs 1 through 76.

78. To the extent Defendants claim that the lawsuit by South Carolina against the tobacco companies was not a Medicaid recovery action as compelled by the Medicaid Act, South Carolina has violated and is violating federal law by failing to seek reimbursement of medical assistance payments made through the state Medicaid program from known legally responsible tobacco companies, pursuant to the requirements of the Medicaid Act and governing federal regulations.

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For an order certifying the class;

2. For an order declaring that Defendants are compelled by the Medicaid Act and federal regulations: (a) to seek reimbursement of the medical assistance payments made through South Carolina's Medicaid program from known legally liable third parties such as those tobacco companies already identified by South Carolina; and (b) to disburse all amounts recovered in such third-party reimbursement actions according to the requirements of the Medicaid Act;

3. For preliminary, temporary and permanent injunctions requiring Defendants, their successors, agents,

employees, assigns and all persons working in concert or participation with them to disburse to Plaintiffs, or to cause disbursement to Plaintiffs of that portion of the tobacco litigation settlement proceeds that belongs to Plaintiffs, before such proceeds are deposited in the South Carolina treasury or are otherwise in the possession, custody or control of South Carolina;

4. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to return to Plaintiffs any and all property taken from them, including but not limited to: (a) that portion of the tobacco litigation settlement that rightly belongs to Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; or to provide just compensation to Plaintiffs to the full value of the property taken;

5. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to provide to each and every member of the Plaintiff Class due process of law concerning any and all property previously taken from Plaintiffs, including, but not limited to: (a) notice; (b) information and documents sufficient to apprise each Plaintiff of the total amount expended by South Carolina's Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individual's behalf; and (c) a pre-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

6. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to provide to each and every member of the Plaintiff Class due

process of law concerning any and all property taken from the Plaintiffs in the future, including: (a) notice; (b) information and documents sufficient to apprise each member of the Plaintiff Class of the total amount expended by South Carolina's Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by South Carolina on that individual's behalf; and (c) a post-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

7. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to take all steps necessary to retain all monies previously collected and all monies to be collected as a result of its settlement with tobacco companies, so that those settlement monies are not deposited in South Carolina treasury and will be available for proper accounting and disbursement according to the requirements of the Medicaid Act, other federal laws, the Constitution of the United States, and any and all orders of this Court;

8. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them to take all steps necessary to retain all amounts collected by South Carolina as a result of its settlement with the tobacco companies, and to notify each and every member of the Plaintiff Class of the state law procedures whereby Plaintiffs may obtain their federally mandated portion of the amounts recovered;

9. For preliminary and permanent injunctions requiring Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to seek reimbursement of medical assistance payments made

through the South Carolina Medicaid program from tobacco companies and other known legally liable third parties according to the requirements of the Medicaid Act;

10. For costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

11. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/_____

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ATTORNEYS FOR PLAINTIFFS

April 7, 2000
Greenville, South Carolina

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Case No. 2:00-CV-0073

LOIS STRAWSER, JOYCE PERRY, JAMES H. SHEPPARD, MARY JEAN BOOTH, JOYCE D. BARKER, BETTY JEAN GILMAN, and KATHY ROBERTSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ELIZABETH S. LAWTON, in her capacity as Commissioner of the Bureau for Medical Services, West Virginia Department of Health and Human Resources; DARRELL W. PETERS, in his capacity as Supervisor, Third Party Liability, Office of Administration, Accounts Receivable Unit of the Bureau for Medical Services, West Virginia Department of Health and Human Resources; JOAN E. OHL, in her capacity as Secretary of the West Virginia Department of Health and Human Resources; DARRELL V. MCGRAW, JR., in his capacity as Attorney General of the State of West Virginia; JOHN DOE, Escrow Agent,

Defendants.

CLASS ACTION AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Lois Strawser, Joyce Perry, James H. Sheppard, Mary Jean Booth, Joyce D. Barker, Betty Jean Gilman, and Kathy Robertson, on behalf of themselves and all others similarly situated, allege:

Nature of the Lawsuit

1. This action is brought by and on behalf of the state's most powerless citizens – poor people who have suffered, death, disease and debilitation from tobacco use and who are dependent upon the state's Medicaid program to help pay for their medical care.

2. The State of West Virginia receives hundreds of millions of dollars in federal funds by virtue of its participation in the Medicaid program *and* its concomitant agreement to comply with The Medicaid Act and attendant federal regulations.

3. Specifically, the state must comply with those provisions of the Medicaid Act mandating (a) the recovery of medical assistance payments from third parties who are responsible for causing Medicaid recipients' sickness, injury and death, and (b) the disbursement of a portion of funds collected from those responsible third parties to injured Medicaid recipients, such as the Plaintiffs.

4. This case arises following the state's successful lawsuit against the manufacturers of tobacco products, *Darrell V. McGraw, Jr., Attorney General ex rel., State of West Virginia v. The American Tobacco Company, et al., Civil Action No. 94-C-1707*, filed by the state in the Circuit Court of Kanawha County on September 20, 1994. In the course of that litigation, in numerous pleadings filed with the court and in countless public pronouncements, state officials, including Defendant Attorney General Darrell V. McGraw, Jr. identified the tobacco company defendants as third parties legally liable for causing Medicaid recipients' sickness, injury and death.

5. Once the state identified the tobacco companies as responsible third parties within the meaning of the Medicaid Act, federal law compelled the state to seek from those companies reimbursement of all monies paid through the

state Medicaid program on behalf of persons injured by tobacco use.

6. The state's complaint against tobacco companies alleged "The West Virginia Department of Health and Human Resources ("DHHR"), which includes the Bureau of Public Health and the Bureau for Medical Services, pays for and administers the West Virginia Medicaid program, ... In fulfilling its duties, DHHR expended and will expend substantial sums of money due to the increased cost of providing health care and other services attributable to tobacco-related disease and illness," and it explicitly sought to recover monetary damages "in an amount which is sufficient to provide restitution and re-pay the State for the sums the State has expended" and for damages "in restitution for the sums of money currently being paid and to be paid by the State in the future..."

7. In addition to its complaint, numerous other pleadings and official statements made by state officials, including Defendant Attorney General McGraw, in the course of the state's lawsuit against the tobacco companies, reveal that the central element of damages claimed by the state was the cost of medical payments made through the state's Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

8. On November 23, 1998, the state settled its lawsuit with the tobacco companies pursuant to a Master Settlement Agreement, whereby the state agreed to dismiss the suit and forever release and discharge the tobacco defendants in exchange for cash payments in an amount in excess of $1.933 billion, the bulk of which is to be paid to the state in annual payments over the next 25 years.

9. The state dismissed its lawsuit against the tobacco companies on or about December 11, 1998, and the Master Settlement Agreement became final on or about April 11, 1999. The state received its first payment of approximately $21.9 million on or about December 16, 1999, and received

an additional installment of approximately $18.9 million on or about January 1, 2000.

10. Legislation passed by the West Virginia Legislature on or about March 13, 1999 included a finding that "[t]he revenues received pursuant to the master settlement agreement are directly related to the past, present and future costs incurred by the state for the treatment of tobacco related illnesses." [Acts 1999, c. 281; codified at W.V. Code § 4-11A-1(b).]

11. On or about January 12, 2000, the state's Secretary of Administration, in reference to the decision to apply settlement proceeds to the Medicaid program budget, publicly stated "[t]he tobacco settlement is paying the state back for money it has already spent for tobacco-related illnesses."

12. Notwithstanding the fact that the state's lawsuit against the tobacco companies explicitly sought to recover monies paid through the state's Medicaid program, the state officials have claimed that the lawsuit was not a Medicaid recovery action as compelled by the Medicaid Act, and that the state is therefore not required to disburse the settlement proceeds according to the requirements of federal law. The state has taken no steps to disburse to the plaintiffs any portion of the settlement amount or to inform the plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled.

13. If, as the state claims, its suit against the tobacco companies was not a Medicaid recovery action, then, even in the face of its own repeated acknowledgment that the tobacco companies are third parties responsible for Medicaid recipients injuries and death, the Defendants have violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies as compelled by the Medicaid Act and its regulations.

14. If the state's lawsuit against the tobacco companies for the recovery of millions of dollars in medical payments was, as it clearly appears, a recovery action compelled by the Medicaid Act, then the state has violated federal law by refusing to comply with those provisions of the Medicaid Act that compel the state to disburse a portion of the settlement monies directly to the plaintiffs.

15. Whether the state is violating the Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies or are violating the Medicaid Act by failing to distribute to the Plaintiffs a part of the settlement monies the state has already recovered from those companies, the state has illegally deprived and continue to deprive the Plaintiffs of their rights and their property in violation of federal law and the United States Constitution.

16. Defendants' failure to comply with federal law not only deprives Plaintiffs of rights and property secured by federal law and the Constitution, but further threatens the state's entitlement to federal Medicaid funds, endangers the Plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well being of tens of thousands of West Virginia's poorest citizens, including the Plaintiffs and others similarly situated. This Complaint for declaratory and injunctive relief seeks to compel the state and its officials to comply with their duties under federal law.

Jurisdiction and Venue

17. This action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

18. Venue is based upon 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to the claims herein arose, and a substantial part of the property that is the subject of the action is located, in the Southern District of West Virginia.

Parties

19. Plaintiff Lois Strawser is a citizen and was at all times relevant a resident of the state of West Virginia, and the Southern District thereof, who suffers from smoking-related illness, including bronchitis, pneumonia, emphysema and asthma, and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program since 1994.

20. Plaintiff Joyce Perry is and was at all times relevant a resident of the state of West Virginia, and the Southern District thereof, who suffers from smoking-related illness, including bronchitis and cardiopulmonary disease, and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program since 1966.

21. Plaintiff James H. Sheppard is and was at all times relevant a resident of the state of West Virginia, and the Southern District thereof, and is the surviving spouse of decedent Peggy S. Sheppard, who was at all times relevant a resident of the state of West Virginia, and the Southern District thereof, who died on December 3, 1999 from smoking-related illness including lung cancer, having been a recipient of medical assistance benefits for that condition through West Virginia's Medicaid program since August 1, 1999.

22. Plaintiff Mary Jean Booth is and was at all times relevant a resident of Chapmanville, Logan County, West Virginia, and the Southern District thereof, who suffers from smoking-related illness, including bronchitis, cardio-pulmonary disease, and emphysema and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program for the past 15 years.

23. Plaintiff Joyce D. Barker is and was at all times relevant a resident of Chapmanville, Logan County, West Virginia, and the Southern District thereof, who suffers from

smoking-related illness, including bronchitis and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program for the past 20 years.

24. Plaintiff Betty Jean Gilman is and was at all times relevant a resident of Delbarton, Mingo County, West Virginia, and the Southern District thereof, who suffers from smoking-related illness, including throat cancer and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program for the past 20 years.

25. Plaintiff Kathy Robertson is and was at all times relevant a resident of Verdunville, Logan County, West Virginia, and the Southern District thereof, who suffers from smoking-related illness, including bronchitis, cardio-pulmonary disease, and emphysema and has been a recipient of medical assistance benefits for those conditions through West Virginia's Medicaid program for the past 5 years.

26. Defendant Elizabeth S. Lawton is Commissioner of the Bureau for Medical Services, within the West Virginia Department of Health and Human Resources, designated as the single state agency responsible for administering the state Medicaid Plan.

27. Defendant Darrell W. Peters is Supervisor, Third Party Liability, Office of Administration, Accounts Receivable Unit of the Bureau for Medical Services, West Virginia Department of Health and Human Resources. As such, he is responsible for enforcing the recovery policies and practices at issue in this action. Defendant Darrell W. Peters is sued in his official capacity as supervisor, Third Party Liability, Office of Administration, Accounts Receivable Unit of the Bureau for Medical Services, West Virginia Department of Health and Human Resources.

28. Defendant Joan E. Ohl is the Secretary of the West Virginia Department of Health and Human Resources and is

responsible for establishing policies and practices of the Department, and for implementing those policies and practices, including policies and practices for the recovery and disbursement of money paid through the West Virginia Medicaid program. Defendant Joan E. Ohl is sued in her official capacity as the Secretary of the West Virginia Department of Health and Human Resources.

29. Defendant Darrell V. McGraw, Jr. is the Attorney General of the State of West Virginia and was responsible for prosecuting and settling the tobacco litigation on behalf of the state. Defendant Darrell V. McGraw, Jr. is sued in his official capacity as the Attorney General of the State of West Virginia.

30. Defendant John Doe is the escrow agent designated by the parties to the tobacco litigation Master Settlement Agreement to receive, manage and disburse the settlement monies to be paid by the tobacco company defendants to the state. John Doe, in his or its capacity as the designated escrow agent, is an agent and representative of the state of West Virginia acting under color of state law.

31. At all times relevant to this Complaint, defendants Lawson, Peters, Ohl and McGraw were acting under color of law.

Class Action Allegations

32. This action is maintainable as a class action under the Federal Rules of Civil Procedure 23, paragraphs (a), (b)(1)(A) and (b)(2).

33. Plaintiffs Lois Strawser, Joyce Perry, James S. Sheppard, Mary Jean Booth, Joyce D. Barker, Betty Jean Gilman, and Kathy Robertson bring this action on behalf of themselves and all other persons who have received medical assistance through the State of West Virginia's Medicaid program for tobacco-related diseases or injuries, or who are the heirs or guardians of such Medicaid recipients.

34. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately represent the interests of the class.

35. The prosecution of separate actions by individual members of the class would create the risk of inconsistent adjudications, which would establish incompatible standards of conduct for defendants.

36. The defendants have acted or refused to act on grounds generally applicable to all members of the proposed class, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

The Medicaid Program

37. Medicaid is a federal program of medical assistance to eligible low-income persons administered by the states under the cooperative federal-state funding scheme. Although states are not required to participate in Medicaid, if a state chooses to do so, it must conform to federal Medicaid law.

38. The State of West Virginia participates in the Medicaid program. West Virginia's program of medical assistance to low income persons is codified at W. Va. Code §§ 9-1-1 *et seq.*

39. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds, West Virginia was required to submit to the United States Department of Health and Human Services, the Health Care Financing Administration (HCFA), a comprehensive written statement called "A State Plan" describing the nature and scope of its Medicaid program and giving assurance that the program will be administered in conformity with the requirements of The Medicaid Act and all applicable federal regulations.

40. West Virginia's current State Plan, as submitted to HCFA on behalf of the State of West Virginia, was certified

by defendant Attorney General McGraw on June 30, 1994. HCFA has approved the State Plan, and the State has received hundreds and hundreds of millions of dollars in federal Medicaid funds in exchange for the state's commitment to abide by the Plan and to administer its program in compliance with federal law.

Medicaid Third-Party Recovery and Disbursement Requirements

41. The Medicaid Act, at 42 U.S.C. § 1396a(25)(A) and (B), requires each state in its State Plan to agree (a) "to take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services under the plan," and (b) "in any case where legal liability is found to exist after medical assistance has been made available ... [to] seek reimbursement for such assistance to the extent of such legal liability."

42. The Act's implementing regulations, at 42 C.F.R. § 433.138(a) provide that the state "must take reasonable measures to determine the legal liability of third parties who are liable to pay for services furnished under the plan. [Emphasis Added.]

43. To effectuate recovery from responsible third parties, 42 U.S.C. § 1396a(45) requires that each State Plan must "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients."

44. In West Virginia, Medicaid recipients are deemed to have made an automatic assignment to the state by "submission of an application to the department of health and human resources for medical assistance" through the state Medicaid program. W. Va. Code § 9-5-11.

45. The Medicaid Act and its regulations also set forth specific mandatory rules governing the state's disbursement of amounts recovered from responsible third parties.

46. Title 42 U.S.C. § 1396k provides that "[s]uch part of any amount collected by the state under an assignment made

under the provisions of this section shall be retained by the state as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the federal government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected *shall* be paid to such individual." [Emphasis added.]

47. Title 42 Code of Federal Regulations § 433.154 similarly mandates that the state "must distribute" to the individual Medicaid recipients all amounts recovered from responsible third parties in excess of what is required to reimburse the state and federal Medicaid programs for medical payments made on behalf of those recipients.

48. As explained by HCFA in its official commentary published in the Federal Register at the time that § 433.154 was codified, the Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally-mandated distribution requirement ensures that both the state and federal government are made whole, with the balance of any recovery going to the injured party.

49. Federal regulations, at 42 C.F.R. § 433.151, require that West Virginia's State Plan "must provide that the requirements ... for distributing third party collections specified in [section] 433.154 are met."

50. In its State Plan, the State of West Virginia promises HCFA that it meets all requirements of 42 C.F.R. § 433.154.

51. If West Virginia fails to comply with the third party recovery provisions of the Medicaid Act, it will lose its entitlement to federal Medicaid funds (42 C.F.R. § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of West Virginia's poorest citizens, including the plaintiffs.

The Defendants' Failure to Comply with Federal Law

52. The defendants know and for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable, within the meaning of the Medicaid Act, for medical assistance payments made through the West Virginia Medicaid program.

53. This knowledge led the state to commence a lawsuit on September 20, 1994 against various manufacturers of tobacco products and other tobacco industry defendants, asserting that the defendants' misconduct injured the state by increasing the costs of health care benefits paid by the state through its Medicaid program.

54. The state's Third Amended Complaint, which was the operative complaint at the time the tobacco litigation was settled, alleged among other things, that:

> 1. Darrell V. McGraw, Jr., the duly elected and present Attorney General of the State of West Virginia, acting on behalf of the State of West Virginia (the "State") and at the request of and on behalf of his statutory clients, the West Virginia Public Employees Insurance Agency and the West Virginia Department of Health and Human Resources, brings this action.
>
> 2. The State spends millions of dollars each year to provide or pay for health care and other necessary services and programs on behalf of indigents and other eligible citizens, whose health care costs are increased by tobacco-related disease and illness.
>
> 5. This action is thus brought pursuant to constitutional, statutory, common law and/or equitable authority for the purposes of, *inter alia*, (i) obtaining restitution and reimbursement for all the costs the State has incurred, and continues to incur, in providing health care and other services to eligible

citizens of the State who suffer, or who have suffered, from tobacco-related injuries, diseases and illnesses as a result of the actions of defendants; ...

12. The West Virginia Department of Health and Human Resources ("DHHR"), which includes the Bureau of Public Health and the Bureau for Medical Services, pays for and administers the West Virginia Medicaid program, ... In fulfilling its duties, DHHR expended and will expend substantial sums of money due to the increased cost of providing health attributable to tobacco-related disease and illness, care and other services.

39. ... Under various state services and programs, the State pays out large sums of money for the provision of necessary health care and other necessary assistance to eligible citizens in the State ...

47. Also at times relevant to this complaint, defendants purposefully and intentionally engaged in these activities and other tortious and unlawful activity, and continue to do so, knowing full well that the State would confer a benefit upon defendants by providing or paying for health care and other necessary facilities and services for certain of the State's citizens thus harmed by the intended use of defendants' cigarettes, and, in the absence of the performance of such duty by defendants, that the State itself would thereby be harmed.

52. The State spends millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of indigents and other eligible citizens whose said health care costs are directly caused by tobacco-related cardiovascular disease, lung cancer, emphysema, other respiratory diseases as well as complications of pregnancy and childbirth including but not limited to low-weight babies.

247. As a direct and proximate contributing result of having inhaled cigarette smoke during the exposure period, certain residents of the State have contracted diseases or suffered certain injuries that resulted in the expenditure by the State of substantial sums in order to provide medical care for, without limitation, one or more of the following conditions: ...

248. The State further charges that, as a direct and proximate result of having inhaled cigarette smoke, residents of the State will continue to suffer from the above-referenced conditions, and the State will continue to expend substantial sums of money to care for them.

249. Because of the latency period of the above diseases and the active concealment by defendants of the causes and effects of exposure to cigarette smoke, the State has only recently discovered the liability of defendants to the State for medical expenses expended for medical care.

[Note: Emphasis added; paragraph numbers from Third Amended Complaint].

55. In its complaint, the state sought to recover damages "in an amount which is sufficient to provide restitution and re-pay the State for the sums the State has expended" and for damages "in restitution for the sums of money currently being paid and to be paid by the State in the future ... including, without limitation, costs for medical care." Moreover, the Master Settlement Agreement expressly declares that no settlement payments are made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or ... the cost of a tangible or intangible asset or other future benefit."

56. Moreover, public statements made by Defendant Attorney General McGraw during the course of the tobacco litigation reveal that, although the state asserted various

different legal theories in its petition, the purpose of the lawsuit was to recover funds paid through the state Medicaid program.

57. On or about September 20, 1994, upon filing the original complaint, Defendant Attorney General McGraw publicly stated that he had standing to recover damages for Medicaid.

58. On or about June 21, 1995 Defendant Attorney General McGraw: (i) publicly stated that the purposes of the lawsuit against the tobacco companies was "to recoup the tens of millions of dollars it has cost our state to provide health care for victims of their products;" (ii) publicly acknowledged that "if the state wins the lawsuit, we must pay back the government for its share of Medicaid funds;" and (iii) publicly stated "if we win, our state recoups huge sums we have paid out caring for victims."

59. On or about August 17, 1995, Defendant Attorney General McGraw stated, in reference to the tobacco litigation, that the state "must either resign itself to continue to pay more each year or try to obtain reimbursement for medical costs from the companies that profited from the sale of products that caused the illnesses," and that "the time has come to reassess the benefits of seeking reimbursement of medical costs expended by the state for cigarette-related illnesses due to the conduct and actions of the tobacco industry."

60. On or about November 17, 1998, when a proposed national settlement was being discussed, Defendant Attorney General McGraw said he needed to consult his client, specifically referring to the Department of Health and Human Resources, on whose behalf he sued tobacco companies to recover money spent treating smoking-related illnesses. Also at that time, Dr. Henry Taylor, commissioner of the West Virginia Bureau of Public Health, said that the point of the litigation was to reimburse states for the cost of treating tobacco-related illnesses.

61. Pursuant to the terms of the Master Settlement Agreement and West Virginia's release of the tobacco companies, West Virginia has forever waived its right to litigate any theories of Medicaid recovery against tobacco companies or to seek from the tobacco companies any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of the plaintiffs' claims or otherwise.

62. The parties to the Master Settlement Agreement, including Attorney General McGraw, took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though West Virginia's complaint explicitly sought to recover medical expenditures, and even though distribution of the settlement proceeds under the Master Settlement Agreement mirrors each state's proportionate share of tobacco-related expenditures. It has been admitted by various state governors and by the National Governors Association, for example, that "Our states' attorneys general carefully crafted the tobacco agreement to reflect only state costs."

63. The states were motivated to "carefully craft" the Master Settlement Agreement in this way so that they could attempt to avoid their legal obligations to disburse a portion of the recovery to the federal government, as required by the Medicaid Act.

64. It is a matter of public record, for example, that one of the top priorities of the National Governors Association was to "develop a strategy aimed at preventing the federal government's seizure of state tobacco settlement funds," and that the states, including West Virginia, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

65. In May, 1999, as a result of the states' lobbying efforts to avoid paying any of the tobacco settlement monies to HCFA, Congress amended the Medicaid Act, 42 U.S.C. § 1396b(d) to add language waiving the federal government's

entitlement to its portion of the settlement proceeds. This legislation was described by the National Governors Association as the governors' "number one legislative priority."

66. The amendment to § 1396b(d), however, does not alter the state's legal obligation to disburse to the plaintiffs that portion of the settlement monies that exceeds the state's Medicaid costs. Congress did not alter or amend any section of the Medicaid Act affecting the state's disbursement obligation to Medicaid recipients.

67. The $1.933 billion that West Virginia is poised to receive from the tobacco companies exceeds even the most generous estimates of what the state has actually paid on behalf of Medicaid recipients in this state who have suffered smoking-related injuries.

68. This excess recovery belongs to the plaintiffs, and it must be disbursed to them.

First Claim for Relief

(Declaratory Judgment, 28 U.S.C. § 2201)

69. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraph 1 through 68.

70. There is an actual controversy between the parties. Plaintiffs content that the Defendants have failed to comply with the third party recovery provisions of the Medicaid Act and regulations, including those provisions that govern the disbursement of recovered funds to the Plaintiffs. Defendants contend that they have complied with federal law.

71. Plaintiffs, and all members of the Plaintiff Class, have suffered, and continue to suffer and are threatened with suffering irreparable injury.

72. Plaintiffs, and all members of the Plaintiff Class, have no adequate remedy at law to redress the violations of the law alleged herein.

73. The plaintiffs are entitled to a declaration of their rights and the Defendants' obligations with respect to the integrity of West Virginia's Medicaid program insofar as the Defendants' failure to comply with federal laws imperils continued receipt of federal funds and endangers the public assistance program upon which Plaintiffs rely to maintain their health and well-being.

74. The plaintiffs are also entitled to a declaration of their rights and the Defendants' obligations with respect to the provision of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

Second Claim for Relief

(Deprivation of Property Without Due Process)

75. Plaintiffs reallege and incorporate herein by reference each and every allegations of Paragraphs 1 through 70.

76. The defendants have deprived plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

77. Among other things, the defendants have deprived plaintiffs of (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the plaintiffs to the state as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

Third Claim for Relief

(Taking of Property Without Just Compensation)

78. Plaintiffs reallege and incorporate herein by reference each and every allegations of Paragraphs 1 through 73.

79. Defendants have taken plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

80. Among other things, the defendants have deprived plaintiffs of (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and Federal Regulations; (b) that plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and Federal Regulations; and (c) the value of the rights assigned by the plaintiffs to the state as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

81. The defendants' decision to take plaintiffs' property—expressed in, among other things, the tobacco litigation Master Settlement Agreement and public statements made by West Virginia state officials, including Attorney General McGraw—is a final decision.

82. The Master Settlement Agreement, having become final, and the state's tobacco lawsuit having been dismissed with prejudice, no available state procedures or adequate state process exists for the plaintiffs to seek just compensation.

Fourth Claim for Relief

(Violation of the Medicaid Disbursement Requirements, 42 U.S.C. § 1983 and 42 U.S.C. § 1396, 1396a and 1396k)

83. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1 through 78.

84. The defendants have violated and are violating federal law by failing to disburse properly funds that the state has recovered, and will recover, from legally responsible tobacco companies, as compelled by the Medicaid Act and governing federal regulations.

Fifth Claim for Relief

(Violation of the Medicaid Act Recovery Requirements, 42 U.S.C. § 1983 and 42 U.S.C. §§1396, 1396a and 1396k)

85. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1 through 80.

81. To the extent Defendants may claim that West Virginia's lawsuit against the tobacco companies was not a Medicaid recovery action as compelled by the Medicaid Act, the Defendants have violated and are violating federal law by failing to seek reimbursement of medical assistance payments made through the State Medicaid program from known legally responsible tobacco companies, pursuant to the requirements of the Medicaid Act and governing federal regulations.

Prayer for Relief

WHEREFORE, plaintiffs pray for judgment against the Defendants as follows:

1. For an order certifying the class;

2. For an order declaring that the defendants are compelled by the Medicaid Act and federal regulations: (a) to seek reimbursement of the medical assistance payments made through the state Medicaid program from known legally liable third parties such as those tobacco companies already identified by the state; and (b) to disburse all

amounts recovered in such third party reimbursement actions according to the requirements of the Medicaid Act;

3. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them to disburse to the plaintiffs, or to cause disbursement to the plaintiffs of that portion of the tobacco litigation settlement proceeds that belongs to the plaintiffs, before such proceeds are deposited in the state treasury or are otherwise in the possession, custody or control of the state;

4. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to return to the plaintiffs any and all property taken from them, including but not limited to: (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the plaintiffs to the state as a condition of Medicaid eligibility, to the full value of all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments, or to provide just compensation to the plaintiffs of the full value of the property taken.

5. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to provide to each and every member of the plaintiff class due process of law concerning any and all property previously taken from the plaintiffs, including but not limited to: (a) notice; (b)

information and documents sufficient to apprise each plaintiff of the total amount expended by the state Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individual's behalf; and (c) a pre-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

6. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to provide to each and every member of the plaintiff class due process of law concerning any and all property taken from the plaintiffs in the future, including: (a) notice; (b) information and documents sufficient to apprise each member of the plaintiff Class of the total amount expended by the state Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individual's behalf; and (c) a post-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

7. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to take all steps necessary to retain all monies previously collected and all monies to be collected as a result of its settlement with tobacco companies, so that those settlement monies are not deposited in the state treasury and will be available for proper accounting and disbursement according to the requirements of the Medicaid Act, other federal laws, the

Constitution of the United States, and any and all orders of this Court;

8. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them to take all steps necessary to retain all amounts collected by the state as a result of its settlement with the tobacco companies, and to notify each and every member of the plaintiff class of the state law procedures whereby the plaintiffs may obtain their federally mandated portion of the amounts recovered;

9. For temporary, preliminary and permanent injunctions enjoining and requiring the defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to seek reimbursement of medical assistance payments made through the state Medicaid program from tobacco companies and other known legally liable third parties according to the requirements of the Medicaid Act;

10. For costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

11. For such other and further relief as the Court deems just and proper and that may benefit the members of this deserving class.

Dated: April 26, 2000

Counsel for Plaintiffs

/s/_____

Troy N. Giatras, WV Bar No. 5602
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8 Capitol Street, 8th Floor
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APPENDIX J

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except

for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX K

42 U.S.C. § 1396k

§ 1396k. - Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall –

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required –

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into

consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C. § 1396b(d)

§ 1396b. Payments to States

(d) Estimates of State entitlement; installments; adjustments to reflect overpayments of underpayments; time for recovery or adjustment; uncollectable or discharged debts; obligated appropriations; disputed claims

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsections (a) and (b) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsections, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(B) Expenditures for which payments were made to the State under subsection (a) of this section shall be treated as an overpayment to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party

pursuant to the provisions of its plan in compliance with section 1396a(a)(25) of this title.

(C) For purposes of this subsection, when an overpayment is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment before adjustment is made in the Federal payment to such State on account of such overpayment. Except as otherwise provided in subparagraph (D), the adjustment in the Federal payment shall be made at the end of the 60 days, whether or not recovery was made.

(D) In any case where the State is unable to recover a debt which represents an overpayment (or any portion thereof) made to a person or other entity on account of such debt having been discharged in bankruptcy or otherwise being uncollectable, no adjustment shall be made in the Federal payment to such State on account of such overpayment (or portion thereof).

(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation

initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19) of this section, a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

(4) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(5) In any case in which the Secretary estimates that there has been an overpayment under this section to a State on the basis of a claim by such State that has been disallowed by the Secretary under section 1316(d) of this title, and such State disputes such disallowance, the amount of the Federal payment in controversy shall, at the option of the State, be retained by such State or recovered by the Secretary pending a final determination with respect to such payment amount. If such final determination is to the effect that any amount was properly disallowed, and the State chose to retain payment of the amount in controversy, the Secretary shall offset, from any subsequent payments made to such State under this subchapter, an amount equal to the proper amount of the disallowance plus interest on such amount disallowed for the period beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period.

(6)(A) Each State (as defined in subsection (w)(7)(D) of this section) shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to –

(i) provider-related donations made to the State or units of local government during such fiscal year, and

(ii) health care related taxes collected by the State or such units during such fiscal year.

(B) Each State shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to the total amount of payment adjustments made, and the amount of payment adjustments made to individual providers (by provider), under section 1396r-4(c) of this title during such fiscal year.

42 U.S.C. § 1983

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 C.F.R. § 433.154

Title 42 – Public Health
Chapter IV – Centers for Medicare & Medicaid Services, Department of Health and Human Services

Part 433 – State Fiscal Administration
Subpart D – Third Party Liability

Sec. 433.154. Distribution of collections.

The agency must distribute collections as follows—

(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.

(b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with Sec. 433.153.

(c) To the recipient, any remaining amount. This amount must be treated as income or resources under part 435 or part 436 of this subchapter, as appropriate.

Supreme Court, U.S.
FILED
OCT 23 2002
CLERK

No. 02-272

In the
Supreme Court of the United States

LOIS STRAWSER, *et al.*,
Petitioners,

v.

NANCY V. ATKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Section 1396b(d)(3)(B)(ii) of Chapter 42 of the United States Code, which provides that "a State may use amounts recovered or paid to the State as part of" the national tobacco settlement "for any expenditures determined appropriate by the State," mean that the States may use these funds for any purposes that they deem appropriate, even when Medicaid recipients claim that they are entitled to some of those funds on authority of Section 1396k(b) of Chapter 42 of the United States Code?

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42 U.S.C. 1396b(d)(3)(B) 2,5,8

42 U.S.C. 1396b(d)(3)(B)(ii) 3,4,5,6

42 U.S.C. 1396k(b) (2002) 3,7

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STATEMENT OF RELATED CASES

Three times this year this Court has denied petitions for certiorari involving the same issue of statutory construction that Petitioners seek to raise. *See Greenless v. Almond*, 70 U.S.L.W. 3709 (U.S. Oct. 7, 2002) (No. 01-1635), *denying cert. to* 277 F.3d 601 (1st Cir. 2002); *Tyler v. Douglas*, 122 S. Ct. 2361 (2002), *denying cert. to* 280 F.3d 116 (2d Cir. 2001); *Harris v. Owens*, 122 S. Ct. 2294 (2002), *denying cert. to* 264 F.3d 1282 (10th Cir. 2001).[1] This Petition mischaracterizes *Harris* and *Tyler* as pending petitions. *See* Pet. at 2, 16.[2] The Court denied certiorari in *Tyler* two months before this petition was filed, in *Harris* seven weeks before this petition was filed, and in *Greenless* earlier this month.

STATEMENT OF THE CASE

Respondents adopt the Fourth Circuit's statement of facts and statement of the district court proceedings, *see* Pet. at 5a-12a, and supplement it briefly as follows. This conflict arises out of the States' settlement of their lawsuits against leading tobacco manufacturers. North Carolina, West Virginia and South Carolina, like most other States, sued tobacco manufacturers on a number of claims, including restraint of trade and unfair and deceptive trade practices. They sought injunctive relief as well as past and future damages for the States arising out of the companies' manufacturing and marketing of tobacco products. No individual plaintiffs were

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[1] Petitioners themselves admit that *Greenless* and *Harris* "present[ed] essentially the same issues of statutory construction" that this case presents. Pet. at 2.

[2] The text of the petition states that *Harris* and *Tyler* are pending, Pet. at 2, 16. However, the Table of Cases correctly indicates that *Tyler* was denied by this Court on June 10, 2002.

party to the suit, and the States alleged harm only to themselves and the general public as a whole.

The Master Settlement Agreement (MSA)[3], which settled the lawsuits filed by these three and forty-three other states, released only the states' claims against the tobacco manufacturers. The MSA expressly did not settle or release the claims of all other persons for "private or individual relief for separate and distinct injuries." MSA § II(pp), p. 19. In addition, the tobacco product manufacturers who signed the MSA expressly did not admit liability or wrong doing. MSA § XVIII(e), p. 113.

Subsequent to the signing of the MSA but prior to the filing of the suits herein, Congress enacted 42 U.S.C. § 1396b(d)(3)(B), which provided that the States' recovery under the MSA was not subject to the Federal Medicaid recoupment provisions. That statute provides as follows:

> (i) Subparagraph (A) and paragraph (2)(B) [which refer to the Medicaid recovery provisions upon which the Petitioners here base their claim for MSA money] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26, and State Attorneys General, or as a party of any individual state settlement of judgment reached in litigation initiated or pursued by a State against one or more such manufacturers

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[3] Full text of the Master Settlement Agreement with Exhibits can be found at: http://www.naag.org/upload/1032468605_cigmsa.pdf. All MSA page references *infra* refer to the electronic pagination which differs from the pagination indicated in the document's Table of Contents.

> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

Despite this statute, Petitioners brought suit in the federal courts of their respective States contending that a share of the MSA payments belonged to them under the Medicaid recovery provisions of the Medicaid Act, 42 U.S.C. § 1396k(b).[4] District courts in all three States dismissed the complaints.

The Fourth Circuit affirmed the district courts' decisions, relying on the plain meaning of 42 U.S.C. § 1396b(d)(3)(B)(ii). *See* Pet. at 16a-18a. In so holding, the Fourth Circuit expressly followed the First, Second, and Tenth Circuits' recent decisions on the same issue -- decisions that have recently been denied review in this Court. *See id.* at 17a-18a; *Greenless,* 70 U.S.L.W. 3709; *Tyler,* 122 S. Ct. 2361; *Harris,* 122 S. Ct. 2294.

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[4] Similar suits were filed by Medicaid recipients in many states. Generally, as in *Greenless, Tyler* and the cases presented by this petition, the plaintiffs had some common counsel.

ARGUMENT

I. THIS CASE PRESENTS A NARROW ISSUE OF STATUTORY CONSTRUCTION THAT THE COURTS OF APPEALS HAVE CONSISTENTLY DECIDED IN FAVOR OF THE STATES.

Petitioners ask the Court to review the Fourth Circuit's interpretation of 42 U.S.C. § 1396b(d)(3)(B)(ii), arguing that the Fourth Circuit incorrectly applied the plain meaning doctrine of statutory construction. Petitioners' request should be denied.

First, the statute has been consistently interpreted by the Courts of Appeals to deny Medicaid recipients' claim to MSA money – there is no conflict among them. The First, Second, and Tenth Circuits have interpreted 42 U.S.C. § 1396b(d)(3)(B)(ii) the same way that the Fourth Circuit interpreted it here. *See Greenless,* 277 F.3d at 608-09; *Tyler,* 280 F.3d at 121-24; *Harris,* 264 F.3d at 1294-98; Pet. at 17a-18a.[5] Because the holdings in *Greenless, Harris, Tyler,* and this case are so similar, Petitioners do not even claim a circuit conflict on the question presented. Instead, they attack "the opinions of the First, Second, Fourth, and Tenth Circuits" as an integrated group. Pet. at 7. This argument confirms the lack of a conflict among the circuits that would invite review by this Court. In particular, there is no conflict "on the same . . . matter" addressed in this petition -- the interpretation of Section

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[5] The Sixth Circuit has recently joined this group by interpreting Section 1396b(d)(3)(B)(ii) the same way. *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2001), *rehearing, en banc, denied,* No. 00-5942/00-6282, 2002 U.S. App. LEXIS 16357 (6th Cir. Aug. 9, 2002).

1396b(d)(3)(B)(ii). SUP. CT. R. 10(a) (2002). No court of appeals has accepted Petitioners' interpretation of that statute.[6]

Consequently, Petitioners seek to manufacture a conflict from the fact that some courts have relied on reasons for denying the Medicaid recipients' claims different from those reached by the Fourth Circuit here. *See* Pet. at 12-16.[7] This does not create a conflict among the Circuits. It merely reflects the fact that there are many reasons why the Petitioners' claims fail.[8] Since the Fourth Circuit avoided

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[6] Petitioners cite a Seventh Circuit decision in which the existence and significance of Section 1396b(d)(3)(B) was raised for the first time at oral argument. *See Floyd v. Thompson,* 227 F.3d 1029, 1034 (7th Cir. 2000); Pet. at 13. The Seventh Circuit spent two sentences, less than one hundred words, wondering about Congress's *motives* for passing Section 1396b(d)(3)(B), before moving on to other issues, including the basis it found for affirming dismissal of the Medicaid recipients' claims. *Floyd* creates no conflict among the circuits as to the meaning of Section 1396b(d)(3)(B)(ii).

[7] Petitioners indicate that seven Courts of Appeals in addition to the Fourth have decided claims on tobacco settlements by Medicaid recipients. All of the decisions have been adverse to the Medicaid recipients. Pet. at 13-16. In addition to the cases already cited herein, these decisions include *McClendon v. Georgia Dep't of Community Health,* 261 F.3d 1252 (11th Cir. 2001); *Clark v. Stovall,* No. 01-3097, 2002 U.S. App. LEXIS 8312, (10th Cir. April 30, 2002), *cert. denied,* 71 U.S.L.W. 3264, 2002 U.S. LEXIS 7604 (U.S. Oct. 15, 2002); and *Watson v. Texas,* 261 F.3d 436 (5th Cir. 2001).

[8] Respondents herein raised numerous other defenses themselves, including Eleventh Amendment Immunity and several more that the Fourth Circuit catalogued in its opinion below but found it unnecessary to decide. *See* Pet. at 23a, fn.9. The Fourth Circuit recognized that each State had invoked its Eleventh Amendment Immunity. *See* Pet. at 12a-13a. The Court held that it could "properly base [its] holding on the plain language of [Section 1396b(d)(3)(B)(ii)] without resolving the Eleventh-Amendment question," relying on *Vermont Agency of Natural Resources v. United States,* 529 U.S. 765, 779 (2000). Pet. at 13a. (cont'd . . .)

deciding the Eleventh Amendment issue, it is self-evident that the Sixth and Tenth Circuits' disagreement over its application in *Harris* and *Barton* is irrelevant to this case. Moreover, it is immaterial; *Barton*'s ruling on the plain meaning of Section 1396b(d)(3)(B)(ii) is identical to the rulings by the Tenth and Fourth Circuits.[9]

Second, petitions to review the decisions in *Greenless, Harris,* and *Tyler* have already been denied by this Court. This petition presents nothing new.

Finally, the petition presents only a narrow issue, the resolution of which would not create meaningful precedent. This case involves no more than the *application* of the plain-meaning doctrine to one specialized statute. Petitioners complain that "the Fourth Circuit found [Section 1396b(d)(3)(B)(ii)] to be clear, though it is not." Pet. at 11. Even if Petitioners were right, the statute at issue applies only to the States' tobacco settlements, a one-time event. A decision on this narrow statute would not help the lower courts in any other context.

(. . . cont'd)
Respondents continue to reserve all of these defenses.

[9] The Fifth Circuit's ruling on Eleventh Amendment Immunity in *Watson v. Texas* is irrelevant to this case for a different reason. *Cf.* Pet. at 2. As Petitioners eventually admit, *Watson* turned on Texas's express waiver of Eleventh Amendment Immunity. *See Watson,* 261 F.3d at 441. In addition, contrary to this petition, *Watson* did not involve the multi-state Master Settlement Agreement at issue here. That case involved Texas's separate settlement with the tobacco companies. *See id.* at 439, 441.

II. THE PETITION CONTAINS SEVERAL MISSTATEMENTS OF FACT OR LAW.

In addition to mischaracterizing the status of the *Harris* and *Tyler* petitions, *see* p. 4, *supra*, the petition makes certain other misstatements that must be noted now. *See generally* SUP. CT. R. 15.2 (2002).

First, 42 U.S.C. § 1396k(b) does not apply to "any Medicaid recovery." Pet. at 2. It applies only to amounts "collected by [a] State *under an assignment* made under the provisions of [that] section." 42 U.S.C. § 1396k(b) (2002) (emphasis added). The States have all disputed that they based their claims on any assignment by Medicaid recipients.

Second, the record contains no "evidence," as Petitioners assert, that "confirms that the settlement collections of West Virginia, South Carolina, and North Carolina will substantially exceed their actual smoking-related Medicaid expenditures." Pet. at 4-5. It contains only Petitioners' allegation that this is the case. In any event, this is immaterial to the issue at hand. As the Fourth Circuit opinion notes, the MSA settled numerous state claims. Pet. at 9a. The MSA release recites that the settlement is of all state claims "directly or indirectly based on, arising out of or in any way related in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing, or health effects of, (B) the exposure to, or (C) research, statements or warnings regarding, Tobacco Products." *Id.* The MSA expressly did not resolve or settle any individual persons' claims against the tobacco manufacturers. Petitioners, like all other persons, continue to have the right to sue the tobacco manufacturers as individuals under the express terms of the MSA. The States continue to pay the current and future medical costs of Medicaid recipients.

Third, the record does not support Petitioners' assertion that, "before these Medicaid enforcement lawsuits, there was no material controversy over the . . . proposition that the tobacco settlement constituted a Medicaid recovery." Pet. at 5. On the contrary, the Congressional Record concerning Section 1396b(d)(3)(B) reflects that there was a controversy and that Congress proposed to end it in the states' favor. "In the Conference Report, the committee recognized that uncertainty over the distribution of the funds would create 'litigation over the next several years, delaying the availability of these funds and putting planned State uses on hold' and therefore adopted the provision 'in order to permit States which are delaying their plans for the use of these funds the certainty they need to plan their initiatives.' H.R. Conf. Rep. No. 106-143, at 99 (1999)." *Harris*, 264 F.3d at 1295.

CONCLUSION

Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted, this the 23rd day of October, 2002.

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